Supreme Court, U.S.
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Docket # 07-905

Supreme Court of the United States

Thomas Lamont Dyno

Petitioner

v.

The Village of Johnson City

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

Petition for Writ of Certiorari

Thomas Lamont Dyno
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QUESTIONS

1. May the acts or edicts of the Mayor of the Village of Johnson City, New York acting in his official capacity fairly be said to represent official policy of the municipality?
2. May a plaintiff's complaint under FRCP 12(b)(6) be replaced in whole or in part by the movant's attorney affidavit?
3. May a judgment obtained by Fraud on the Court ever serve as legitimate authority for a general municipal policy decision and policy actions based thereon?
4. May policy action in the name of a municipality, which subjects and causes an individual to be subject to an adjacent use of land that deprives them of their enjoyment of life the essential characteristics and attributes of their own property and the enjoyment thereof constitute causes of action under 42 USC § 1983?
5. Does my complaint set forth official capacity actions for which the Village may be liable?

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Petition for Writ of Certiorari to the 2d Circuit Court of Appeals

Orders and Opinions

Dyno *v* the Village of Johnson City 2d Circuit docket # 04-4757; NDNY 3-21

Dyno *v* the Village of Johnson City NDNY 3:21-cv

Statement of Jurisdiction

This petition for a Writ of Certiorari is to review the 2d Circuit Court of Appeals May 24, 2007 affirmation of judgment on record in Dyno *v* Village of Johnson City 04-4757 **[A1-6]**; and Jurisdiction is conferred on this Court by the U.S. Constitution ¶III, §2, cl. 1: 28 USC §§ 1254(1) and 2106. Timely petitions for panel rehearing and rehearing en banc were filed; an undated panel denial of rehearing **[A18]** was entered on August 8, 2007; and a 60-day extension to January 5, 2008 was granted by Justice Ginsberg.

U. S. Const, Statutes, Rules, Ordinances &c

14th A. to the U.S. Const, due process and equal protection clause

> "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article".

42 USC §1983

"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress"

The Code of the Village of Johnson City

§274-4B Definition of Use

"The specific purpose for which land, building or structure is designed, intended, arranged, used or maintained"

Id. Permitted Use Definition:

"Any use specifically allowed in the district, excluding illegal uses and nonconforming uses"

Appearing in the Appendix

NYS Village Law

§4-400	The Mayor	A18-A19
§4-412	The Board of Trustees	A20
§7-700	Grant of Power	A20-A21
§7-712	The Zoning Board of Appeals	A21
§7-712-b	Permitted Action by Zoning Board	A22-A24

Zoning Local Law

§274-32	Uses Permitted r6	A24
§274-33	Area Regulations r6	A24
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§274-16	Powers and Duties	A25-A27
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§274-20	Prerequisites to Issuance	A29
§274-21	Additional Standards	A29-A30
§274-22	Existing Violations	A30
§274-23	Transferability	A30
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NYS CPLR 7804(h)	A31

Statements of Facts

This case was commenced in the Northern District of New York under the 14th A. to the U.S. Const.; 42 USC § 1983, 28 USC §§1331, 1343(a)(3) & (4) and 2201(a): for declaratory, injunctive and damage relief under **Monell, et al. *v* DSS of NYC** 436 US 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 and **Owens *v* City of Independence Missouri, et al.** 445 US 622, 63 L. Ed 2d 673; 100 S. Ct. 1398 @ US 659 note 39 (citing Monell @ U.S. 690):

The Appeal to the 2d Circuit was authorized under 28 USC § 1291 from final judgment of NDNY assigned Judge Norman A Mordue issued September 27, 2004 disposing of all parties' claims on **FRCP 12(b)(6)** ground that my *pro se* complaint "fails to state a cause for which relief may be granted" **[A7-14]**; with the same said ground repeated in disposition of my timely **FRCP 60(b)** motion **[A16-17]**.

Statement of the Case

The Village of Johnson City, on the policy decision of her Mayor, chose to defend in court and otherwise a private use of land which I allege is a prima facie zoning violation and a private intentional nuisance in fact[1] the legality of which has not been established. Said use was situated on adjacent property 3' from my primary rooms of habitation in the "(R6)" single-family residential district of the Village **[A58, ¶4]** which is comprised of 40' wide lots. The Village contends that under an interpretation of her Code that said use is legal and not prosecutable as a zoning violation but is still actionable as a nuisance.

The Village motion to dismiss is on two grounds

1st - She concedes by attorney affidavit addressed to allegations in my complaint: that the basis of her policy actions, challenged therein, is a February 3, 1997 Judgment (hereinafter referred to as "said ¶ 78 judgment"): which dismissed my former attorney's NYS CPLR 7804 petition for mandamus to review a July 15 1996 Village of Johnson City Zoning Board of Appeals determination **[A66, ¶3; A71-72, ¶17; A73, ¶19,** last sentence].

The Village further concedes that said judgment was obtained on grounds other than those invoked by the Zoning Board (hereinafter "ZBrd") **[A66, ¶4**, 3rd sentence] "custom" *cf.* **[A15** ZBrd determination].

My complaint declares, that official Village of Johnson City policy actions stated below subjected and caused me to be subjected to said private adjacent use of land

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[1] See Black's Law Dictionary 7th Ed; also p. 9 infra.

[A37, ¶9] "depriving plaintiff of his enjoyment of life and property without due process of law" **[A38-A39, ¶12]** in violation of equal protection as rights secured by the Federal Constitution and laws **[A42-46 ¶¶19-26** *ff.* ¶¶ 19(C) & (D), ¶¶ **22-25]**.

Official Village Policy Actions

The Village conceded in her answer pleading and NDNY attorney affidavit: that on the dates set forth in my complaint and on the policy decision of the Mayor acting in his official capacity: a course of policy actions flowing from said decision **[A42-44 ¶19]** were executed by the Mayor and were authorized by the Village Board of Trustees **[A61-62, ¶¶21-22]** - *viz.*,

(1) The Mayor ordered the Police to not intervene, against said adjacent private use of land **[A43-44, ¶¶19(C)(i), 19(D)]**; **[A73, ¶19** last sentence]

(2) The Village opposed my application for temporary and preliminary relief against said use **[A47-48, ¶¶27-33** *ff.* **¶¶31-32]**; **[A73-75, ¶¶20-22, *ff.* ¶21]**

(3) After I timely filed a Notice of Claim with the Village, the Village sued my mother my wife and me, because we commenced suit against the Village **[A49-50, ¶37]; [A75-76, ¶23]**.

"These are not cases, as has been suggested, in which the State have merely abstained from action, leaving private individuals free to impose such [servitudes] as they see fit. Rather these are cases in which the State have made available to such individuals the full coercive power of government to deny [plaintiff] ... the

enjoyment of property rights in the premises . . ."[2] **[A77-78, ¶27]**.

(4) The judgment the Village concedes it relied on was obtained by (a) fraud on the Court; the words of my complaint are "misrepresentation and deceit" **[A50, ¶37(A)]** *cf.* p.7 *infra* and (b) other procedural due process violations further specified **[A42-43, ¶22]**;

(5) NYS Village Law does not confer legislative powers upon a ZBrd; nor does it authorize the Mayor to implement and execute general policy and policy actions based solely on a ZBrd determination;

(6) Said policy actions are those of a municipality defending a private use of land "for reasons wholly unrelated to any legitimate State objective"[3] and. are arbitrary government acts in violation of the 14th A. of the US Const. **[A40, ¶14(B); A46, ¶24]**

Decisions of the Lower Federal Courts

The Village answer plea of immunity also concedes that the Mayor was at all times acting in his official capacity **[A61-62, ¶¶ 21-22]**; and it may be gleaned that said **[id ¶22]** plea, refers to said ¶78 judgment.

Now both courts claim that I stated what NDNY declares is a "personal capacity" action against the Mayor acting in his official capacity **[A12-13, ¶2; A4, ¶2] [A10** "II Discussion" and fn. 2].

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[2] Shelley *v* Kramer 334 US 1; 92 L. ed 1161 US 17-22 and @ L. Ed 1182 – 1185 *ff.* @19-20

[3] **Village of Willowbrook *v* Olech** 528 US 562; 120 S Ct. 1073, 145 L. Ed. 2d 1060: *Esmail* v *Mcrane* 53 Fed 176, 180 (CA 7,'95). **Yick Wo *v* Hopkins** 118 US 356 @ 374.

NDNY suggests that **Kentucky *v* Graham** 473 US 159, 167 n.14 requires that all Monell actions naming a Mayor acting in his official capacity are automatically converted into a "personal capacity" action; and to accommodate, the 2d Circuit alleges 1st

> "[That I] did not make any allegation that it was the official policy of the Village ... to rely on ... improperly obtained state court judgments"

Cf. [A44-45, ¶¶ 19(D) & 22]. The 2nd Circuit further alleges, without any basis in my complaint: "[that I] argued only that the Village misinterpreted [her ordinance]" **[A4-5, ¶2]** *cf.* (p. 6, ¶ "(4)", supra).

2nd the other ground, the Village motion to dismiss is based on, is a false allegation that I demanded the Mayor enjoin private persons and when he refused I sued the Village **[A10-11** "II Discussion" @A10]

The foregoing ground has no basis in my complaint but is derived from false allegations set forth in the attorney's affidavit **[A66-67, ¶¶ 4-5]** in support of a Sherman Amendment defence, corroborated by NDNY citing those parts of *Monell* (supra)**[A13]** appertaining to the Sherman Amendment as cited and discussed in **Pembauer *v* Cincinnati** 475 US 469, 479, 480 fn. 7.

The Federal Claim Arose

The Federal causes of action arose, 1st on March 6 1998, when the Mayor adopted said ¶ 78 judgment as the basis of his policy decision and the course of Village policy actions, which flowed therefrom.

Policy Actions and State Law

The policy actions (p. 6 supra) are by NYS powers delegated to the Mayor and Village Board of Trustees

- *viz.*, NYS Village Law §4-400.1.e - viz., "to exercise supervision over the conduct of the police and other subordinate officers of the village"; §4-400.1, d & f: "to intervene in any or all actions, at the direction of the board of trustees, where deemed necessary to protect the rights of the village and its inhabitants"; and "to institute, at the direction of the board of trustees, all civil actions in the corporate name of the Village" (see policy actions p. 6, supra) **[A19-21]**.

Suppression of Evidence

Even though FRCP 60(b) relief in re fraud is specified in my Notice of Appeal filed prior to FRCP 60(b) disposition **[A126-127]**: suppression of public record documentary evidence in re fraud on the court and other material aspects of the case were suppressed on ground that said evidence presented by FRCP 60(b) motion, required an amended Notice of Appeal to enable jurisdictional Appellate review **[A3, ¶2]**.

Part of the concealed evidence are (1) police reports showing that the Mayor acted under NYS Village Law §4-400.1.b & e **[A-116-117]** ordered the Police to not intervene against the use as declared in my complaint **[A43, 19(C)(i)]**. (2) Legal arguments showing under NYS law that if the use could qualify as a custom (p. 4 supra) it could only be a bad custom *Malus usus abolendus est* and that legality of the use was never fully and fairly litigated and decided on the merits.

Concealment was facilitated by NDNY refusal to file my amended Notice of Appeal **[A128-129]** refusing to grant FRAP 4(a)(5)(A) extension **[A123-125]** and the 2nd Circuit refusal to take Judicial Notice of these materials entered on the docket **[A116-117, #37]**.

Under NYS law, the time to file a notice of appeal is computed from service of the Notice of Entry. NDNY misrepresented my "Amended Notice of Appeal" as a Notice of Appeal and ruled that even though said extension is not specifically proscribed under FRCP 6(b)(2): my pro se ignorance that 3 day mail service extension does not apply to FRCP time limitations whose period commences on clerk's entry is inexcusable; so that my attempt to file an amended notice of appeal on November 20, 2006 on his order postmarked October 16, 2006 **[A119, #46** 2nd entry, *cf.* the 1st is false] was inexcusably untimely **[A124]**.

Consequently, my 3 volumes of documentary evidence duly served on opponent and filed with my motion for summary judgment were 1st concealed by the Magistrate Judge acting without 28 USC 636 authority: arbitrarily intercepting said materials and returning them to me on ground that the Judge has to 1st approve my amendment of course **[A111-112 #23]** *cf.* **[A116-117, #37]** all evidenced on the face of the NDNY docket and all ignored by the 2nd Circuit.

Particularity in re Extrinsic Fraud on the Court

The gravaman of my complaint and ZBrd appeal was that said adjacent use of land is a zoning violation - *viz.*, that a basketball court resulting in physical damage to my home **[A80]**[4] along with inescapable noise **[A38-39, ¶ 12; A43, ¶ 19(B)]** was a nuisance contrary to the purpose of the Zoning ordinance **[A86-92]**; that said use is not allowed on single family residential lots in the district (see permitted use

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[4] further established by suppressed evidence - professional estimates, police and detective reports, photographs, &c.

definition p. 2 supra) §§274-24, 32 & 33 **[A31-32, A25-26]** and is thus, a zoning violation, that ought to be declared and prosecuted as such.

The sole reason opposing papers mention a "5 set back rule" is due to a theory created by fmr. Village Attorney William L. Gibson, Jr., (hereinafter Gibson)

Specifically, Gibson claimed that if a facilitating structure for a use is 5 feet from my sideyard then the matter is outside Village purview. At a Board of Trustees hearing, attended by my wife and Mother, Gibson propounded his 5 foot set back theory; whereupon the CEO interjected his belief that the distance between the facilitating structure and my 3 foot sideyard was far less than 5 feet so the Mayor ordered the CEO to measure said distance which he reported to be 3.1 feet **[A81]** which in turn resulted in Gibson's letter of May 20, 1996 **[A82-A85** *ff.*, **A82-83 ¶¶2-3]** which the ZBrd based it's decision on **[A15]**.

I addressed Gibson's five foot set back theory at the ZBrd hearing citing Associate Justice Fields' decision in **Baltimore & Potomac Railroad Company *v* 5th Baptist Church**[5] 108 US 317, 319, 334, 335 in that case the railway company demurred, claiming that while the engines from their round house blew soot and live cinders into said Baptist church during services, the use was not a nuisance because the building is five feet from the church side yard.

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[5] Also **Brechner *v* Lake Success** 23 Misc 2d 159; 201 NYS 2d 254; **People *v* Village of Mamaroneck** 283 NY 325, 326.

Injurious Affect of Extrinsic Fraud

After said ¶78 judgment was issued, the decision made it clear that Gibson deceived and misled the court into depriving me of the statutory procedural scheme of NYS CPLR 7804(f) **[A33]** and violation of the settled NYS rule for mandamus to review (see opposite page) **[A41-42 ¶17 *ff.* ¶17(B); A44 ¶20]**.

Gibson claimed that the ZBrd invoked grounds other than those shown on the face of their decision - *viz.*, the following are excerpts from papers Gibson submitted to the court, which were never served upon me **[A95-97]** comparing Gibson's statement to the actual ZBrd decision **[A15]** it's clear that Gibson's statement, which said ¶78 the judgment is based on is false; and thus explains why State court papers declare permitted use, accessory use and custom, which were clearly not grounds invoked by the zoning board **[A15]** and do not appear in the sole basis of said ZBrd decision, which is Gibson's May 20, 1996 letter **[A82-A85 *ff.*, A82-83, ¶¶2-3]**.

In Village demurrer to my challenge of her policy actions, she relied on said ¶78 Judgment obtained by fraud on the court and in violation of the settled NYS rule for mandamus to review **Matter of Scherbyn *v* Wayne Finger-Lakes Brd. of Co-op Ed. Services, *et al.*** 77 NY 2d 753; 573 NE 2d 562

> "It is a settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency ...If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more

> adequate or proper basis'...[2]...[T]his proceeding is in the nature of mandamus to review, which is similar to certiorari. We perceive no reason why the settled rule which limits judicial review of the determination of an administrative agency in certiorari proceedings to judging 'the propriety of such (determination) solely on the grounds invoked by the agency' ... should not apply equally to mandamus to review proceedings".

Consequently, I was never allowed to have my own complaint; there was no full and fair hearing on my claim nor any opportunity to fully or fairly challenge the decision said to be controlling **Schwartz *v* Public Administrator** 24 NY 2d 65 @ 71 & 72.

Conclusion of Facts

The NYS Appellate court ruled that a nuisance action cannot be tried in a CPLR ¶78 Proceeding **[A102, ¶2]**. So the legality of the use, generally a fact issue, could not have been established in or by such proceeding; except that the following axiom ought to have been observed

Keystone Bituminous Coal *v.* DeBenedictus, 480 U.S. 470, 491 n. 20:

> "...no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity".

Under NYS law, the only way a nuisance may be legal under an ordinance but still actionable as a nuisance

is if it arose out of negligence **Little Joseph Realty** *Op cit supra* @ NYS 2d 433[7] contrasting **Sweet *v* Campbell** 282 NY 146, 25 NE 2d 963 a funeral business in a commercial district with **Arthur *v* Virkler** 144 Misc. 483 a funeral business in a residential business which was ruled a nuisance.

Negligence or intent are issues of fact neither of which could have been determined in said proceeding; and again no one is allowed to impose a private nuisance. So there cannot be any special duty to defend a use of land which the NYS courts and Village concede may be a nuisance **Shelley *v* Kraemer** (supra) @ U.S. 22:

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals".

Under NYS CPLR 4101.2 a nuisance is triable by jury and everyone concedes that I had the right to prosecute a nuisance action **[A67, ¶5** last sentence; **A77-78, ¶27]**. Clearly, the only distinction herein is that the same private use of land is imposed upon me by official Village policy and actions based solely on said ¶78 Judgement obtained by fraud on the court; which is why the Village pleaded immunity.

Under NYS law I am entitled to petition for injunctive relief against a zoning violation which a municipality refuses or fails to prosecute **Little Joseph Realty, Inc *v* Town of Babylon** 41 NY 2d 738; 363 NE 2d 1163; 395 NYS 2d 428 @ NYS 2d 431 "headnote [1,2]"; and I was wrongfully deprived of that right of action without due process of law by fraud on the court.

So clearly, this is not a case where the municipality is passive to a private controversy it is one where she has aggressively defended the use of one while leaving the other with what she concedes is a nuisance action; said act is based on an arbitrary discrimination violating equal protection of adjacent property holders and furthers no legitimate state objective. The relief requested is not Sherman Amendment relief it is relief against Village policy.

If said ¶78 judgment cannot bar a nuisance action, then it cannot bar this Monell suite, so the "personal capacity" fabrication was devised and the triable issue of whether I was deprived of property without due process of law **In re Jacobs** 98 NY 98, 105:

> "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value annihilated; it is owned or kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property"

Has never been fully and fairly litigated and decided on the merits.

Relief Requested

What I seek, herein, is vacation of the NDNY Judgment and the 2d Circuit affirmation thereof and remand to the Trial court for further proceedings and for any further order or relief which to the Court seems proper.

Argument (Rule 10)

1. The 2d Circuit Court of Appeals has Entered a decision that has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and

2. Decided several important federal questions in a way that conflicts with relevant decisions of this Court.

The two main issues the decisions turn on:

(1) Whether the "acts or edicts [of a Mayor of a NYS Village acting in his official capacity] may fairly be said to represent official policy [of the municipality]"

(2) Whether a plaintiff's complaint under FRCP 12(b)(6) may be replaced in whole or in part by the movant's (attorney) affidavit.

A departure from the rules governing disposition of FRCP 12(b)(6) and/or FRCP 12(C) motions facilitated a departure from 2d Circuit case law in re a Monell action **Quinn *v.* Syracuse Model Neighborhood, *et al* and the City of Syracuse** (2d Cir) 613 F.2d 438, 448

> "Surely the Mayor is the one city official whose edicts and acts represent municipal policy ..."

Yet the 2d Circuit affirmed the NDNY saying that an official capacity action against a Village Mayor is really a "personal capacity" action in order to accept an immunity plea from the municipality, where such defense is not allowed in an official capacity action **Owens *v* Independence Missouri** (supra) thereby creating a conflict with the decisions of this Court.

The facts presented and discussed at page 7 supra under the heading "decisions of the lower courts": show that the NDNY relied on a principle set forth in Monell @ US 694 and declared in **Kentucky *v* Graham** 473 US 159, 166: that an official capacity action is allowed "only when the entity itself is a 'moving force' behind the deprivation".

My 3rd Cause of Action (p. 5, ¶ 3) There can be no reasonable doubt that when the Village sued me for injunctive relief based solely on said ¶78 judgment obtained by fraud on the court: that the Village is the "moving force" behind her policy action depriving me of my fundamental right of access to the courts and a full and fair opportunity to show Village deprivations of my fundamental rights in my attempt to vacate judgment and enjoin a zoning violation *cf.* **[A61, ¶20]**.

My 2nd Cause of Action (p. 5, ¶ 2) There can be no reasonable doubt that the Village is the "moving force" in opposing my application for temporary and preliminary relief against the private use of land depriving me of my enjoyment of life and property and thus the Village action subjected and caused me to be subjected to said deprivation without due process of law and in violation of equal protection regarding the equal rights of adjacent property holders "for reasons wholly unrelated to any legitimate state objective".

Both of the foregoing official policy actions of the Village flowed from the policy decision of the Mayor - (p. 5 ¶ 1 supra) i.e., when the Mayor was presented with several choices he adopted said ¶78 judgment obtained by fraud on the court to declare that the use of land in controversy is legal, ordering the police to not intervene, &c "for reasons wholly unrelated to any legitimate state objective",

Any legitimate questions raised in re official capacity actions and what constitutes official policy have been laid down by this Court in **Brandon *v* Holt** 469 US 464 and **Pembauer *v* Cincinnati** 475 US 469:

> "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law" - Pembaur, @ US 483

As shown on pp. 7-8 supra, "Policy Actions and State Law" all of the powers involved in the policy actions challenged in my complaint have been delegated to the Mayor or the Mayor and Board of Trustees. The Mayor is the final policy maker under NYS Village Law 4-400.1.e "to exercise supervision over the conduct of the police and other subordinate officers of the Village" - 1966 Opinions of the State Comptroller Files # 572, #1188, the Mayor heads the police force:

> "Municipal liability under 1983 attaches where - and only where - a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with

respect to the subject matter in question. Pembaur @ US 481-484".

The policy decision was the Mayor ordering the police to not intervene against the use based solely on said ¶78 judgment

> "[T]he power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. Monell's language makes clear that it expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy,' Monell, supra, at 694, and whose decisions therefore may give rise to municipal liability under 1983".

Brandon *v* Holt 469 US 464, 471-474

> "[A] judgment against a public servant "in his official capacity" imposes liability on the entity that he represents .... we decided Owen v. City of Independence, 445 U.S. 622 (1980), a 1983 action in which the complaint named as defendants "the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities.' We held that the qualified immunity that protects public servants acting in good faith was not available to those defendants. In so holding, we expressly distinguished between suits against government officials "in their individual capacities" on the [469 U.S. 464, 473] one hand, and those in which "only the liability of the municipality itself was at issue," on the other".

NDNY and the 2nd Circuit substituted the express words and context of my pleading with the allegations set forth in movant's attorney's affidavit in support of a FRCP 12(b)(6) motion to dismiss.

1st - A motion to dismiss under **FRCP 12 (b) (6)** is on the pleadings. Quoting from the "Federal Civil Rules Handbook 2006" Baicker-McKee, Janssen Corr p 350:

> "When a claim is challenged under this rule, the court presumes that all well pleaded allegations are true, resolves all doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party"

The foregoing is not what happened. In my case whatever the lawyer's papers stated is what was viewed in a light most favorable to him and the state.

The Editor's cite **Jackson *v* Birmingham Brd of Ed**, 544 US 167 126 S Ct. 1497, 1502-1503 and other cases including **Scheuer *v* Rhodes** 416 US 232, 94 S Ct. 1683, 40 L, Ed 2d 90, which is the precedent I relied on declared in my Notice of Appeal [A121-122].

Dismissal on language set forth in an attorney's affidavit rather than the language of my complaint is a departure from the accepted and usual course of judicial proceedings on FRCP 12 (b) (6) and FRCP 12(c) motions to dismiss.

Fraud on the Court

3. As evidenced in the 3rd Circuit Court of Appeals reports of the case **Herring *v* US** 04-4270, there appear to be conflicting views among the various

Circuits in regard to fraud on the Court and this case might assist in laying down a general rule or rules to achieve some conformity. The facts in the particular are presented and discussed at pp. 9-11 supra.

Please note, I'm not asking you to vacate said ¶78 judgment but want a declaration that it cannot serve as the basis of legitimate municipal policy.

The materiality of extrinsic fraud appertains to the full and fair hearing doctrine. The matter is discussed in greater historical detail in the decision on **Tamini *v* Tamini** 38 AD 2d 197, 199-200; 328 NYS 2d 477, 479-480 -e.g., that fraud on the court is the exception to Res Judicata; and then citing C.J. Marshal in **Marine Insurance Co. of Alexandria *v* Hodgson** 7 Cranch [11 US] 332, 336

> "[T]hat any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery"

Other examples and cases are also cited and quoted. **In re Holden** 271 NY 212, 218; 2 NE 2d 631, 633

> "A judgment may be vacated when procured by fraud on the court but not for fraud between the original parties in some remote transaction. To justify a court in setting aside and vacating a judgment on the ground of fraud, the fraud complained of must have been practiced in the

very act of obtaining the judgment. (Mayor v. Brady, 115 N.Y. 599, 614"

Shaw *v* Shaw 97 AD 2d 403; 467 NYS 2d 231

> The inescapable conclusion, in our view ...where there is improper service or no service a default judgment obtained through extrinsic fraud should be vacated without any requirement that the movant show a meritorious defense. Such a judgment is a nullity, irrespective of the question of merit"

Ultimately, the doctrine declared in **US *v* Throckmorton**, 98 US 61, 68, clarifies the issue of extrinsic fraud at hand - viz.,

> "[T]he doctrine on which we decide the present case ... have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered"

According to the documentary evidence provided, the judgment relied on was obtained by the Village attorney misleading the court into rendering judgment on matter that was never before the ZBrd and on grounds other than those invoked by the ZBrd; the key here is that the matter is inadmissible and outside of the court's mandamus to review jurisdiction that it was never served upon me seems ancillary. Under the settled rule in NYS mandamus to review is relegated to the grounds invoked by the ZBrd.

But aside from the fact that the judgment is in violation of the settled rule governing court administration of mandamus to review, this is the

same situation addressed by the aforesaid rules and doctrine - i.e., the fraud was used to obtain the Judgment (Holden, op cit supra) and was extrinsic to what was decided at the ZBrd (viz., "the first court", *Throckmorton*, op cit supra).

The general policy and policy actions of the Village were premised upon inadmissible fabrications, which could not be fully and fairly litigated.

If the actual ZBrd decision were valid it would only apply to the applicant anyway §274-16.F; §274-23.A **[A28; A31]**. And in this case, the persons maintaining the use, made no application.

Had the Board of Trustees enacted the fabrications, before Gibson made them, they would be in public view and subject to Constitutional challenge. Once incorporated into the decision, the only way to challenge them, was for the 1st time on appeal, with the Village swearing they had been argued and affirmed at the ZBrd.

If the ZBrd cannot amend the zoning ordinance, neither can a Judge.

The Mayor's decisions, actions, and the Board of Trustees actions flowing therefrom addressed by my Federal complaint occurred in 1998 and were not before the Zbrd in 1996 because they were absolutely and entirely dependent on fabrications not before the Zbrd which resulted in said ¶78 judgment obtained by fraud on the court; and thus the official policy decision and policy action flowing therefrom were without authority; and consequently, this Monell suit is the only way they may be fully and fairly challenged.

It would be an egregious injustice to deprive me of this opportunity based solely on inadmissible fabrications in what is truly an unrelated private matter regarding a private use of land in controversy which the Village by it's chief policy makers insinuated the Village into defending for no legitimate government purpose and in violation of the equal rights of adjacent property holders **Booth *v.* R., W., & O.T.R.R. Co** 140 NY 257, 35 NE 592 @ NY 274-275:

> "The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure"
>
> "The general rule that no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbor to the use of his property, so that each in exercising his right must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous"[6]
>
> "[S]o that each in exercising his right must do no act which causes injury to his neighbor" (id.)

Board of Regents *v.* Roth 408 US 564 @ 571-572 and @ US 577:

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[6] The majority opinion by Justice Waite in **Munn *v.* Illinois** 94 US 113; 24 L. ed. 77; 4 Otto 113@ 124 – 125, citing the Constitution of Massachusetts and *Thorpe v. R & B Railroad Co.* 27 Vermont 143 declares the same principle.

"The Court has also made clear that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money"

" It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims".

4. Additionally, these decisions impose a heightened pleading standard in conflict with **Leatherman *v.* Tarrant County NICU** 507 U.S. 163

My causes of action are sufficiently stated and remedy may be provided in part by declaratory and injunctive relief against the policy and policy actions as explained above and for damage relief **Gomez *v* Toledo** 446 US 635 headnote [3] and at 638-639 quoting from Owens, *Op cit.* @ US 636 and 651:

"A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed"

In Conclusion

This sort of irregular procedure working hand in glove with misrepresentation and deceit might escape meaningful appellate review; and a municipality does

not have a discretionary right to violate the strict construction doctrine **Cogswell *v.* NY, NH & H. R.R. Co.** 103 NY 10 @ 21

> "[S]tatutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed".

to render a private nuisance, legal without due process of law and in violation of equal protection **Arkansas Natural Gas Co. *v* Arkansas Railroad Commission** 261 U.S. 379, 383 citing **Railway Co. *v* Arkansas** 235 U.S. 350:

> "The rule is fundamental that, if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter".

III Blkstn 217-218 cited in *Booth see also* **Euclid *v* Ambler Realty** 272 US 365 @387-388

Wherefore, I respectfully request that the Writ of Certiorari to the 2nd Circuit may be granted and for any other relief this Court deems just and equitable.

I declare under penalty of perjury that the foregoing is true and correct

Dated:
December 27, 2007

Respectfully submitted,

Thomas Lamont Dyno

Thomas Lamont Dyno
46 Academy Street
Johnson City, New York
13790-1519
Telephone: 607-7290839

4-5747-cv
Dyno v. Village of Johnson City

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2001, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP//:WWW.CA2.USCOURTS.GOV/), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS
ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street, in the City of New York, on the 24th day

of May, two thousand seven.

Present:

HON. ROGER J. MINER,
HON. ROBERT A. KATZMANN,
Circuit Judges,
HON. J. GARVAN MURTHA,
*District Judge.**

Thomas Lamont Dyno,

Plaintiff-Appellant,

v. No. 04-5747-cv

Village of Johnson City, Harry G. Lewis,
Mayor of the Village of Johnson City,

Defendants-Appellees,

Daniel W. Green, adjacent property owner,
Mary Lou Green, adjacent property owner,

Defendants.

Appearing for Appellant:
THOMAS LAMONT DYNO, *pro Se.*

Appearing for Appellee:
OLIVER N. BLAISE, III, Binghamton, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the September 27, 2004, judgment of the district court is AFFIRMED, and the appeal is DISMISSED as to the October 13, 2006 order.

Plaintiff-appellant Thomas Lamont Dyno appeals from the September 27, 2004 judgment and October 13, 2006 order denying a motion to set aside the judgment, of the United States District Court of the Northern District of New York (Mordue, C.J.). We

assume the parties' familiarity with the underlying facts of the case, its procedural history, and the arguments on appeal.

Because Dyno filed a timely notice of appeal from the district court's September 27, 2004, final judgment, that judgment, and all prior interlocutory orders, are reviewable in this Court. *See* Fed. R. App. P. 4(a)(1). The appeal from the district court's October 13, 2006, **order** denying Dyno's motion to set aside the judgment, however, is not reviewable in this Court because the November 20, 2006 notice of appeal is untimely, as it was filed more than 30 days after the entry of the order. *See* Fed. R. App. P. 4(a)(4)(B)(ii).

As an initial matter, by failing to raise any challenge to the district court's dismissal of the complaint against the Greens or to include any argument regarding the Greens' status as state actors, Dyno has abandoned his claims against the Greens by failing to raise them on appeal. *See LoSacco v. City of Middletown,* 71 F.3d 88, 92-93 (2d Cir. *1995).* With respect to the Village of Johnson City and Mayor Lewis, we review a district court's dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6) *de novo. See Cooper v. Parsky,* 140 F.3d 433, 440 (2d Cir. 1998). "[I]n ruling on a Rule 12(b)(6) motion, the district court is required to accept the material facts alleged in the complaint as true, and not to dismiss 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Valmonte v. Bane,* 18 F.3d 992, 998 (2d Cir. 1994) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) (citation omitted)). To succeed on a 42

U.S.C. § 1983 claim, a plaintiff must show that a defendant, acting under the color of state law, deprived the plaintiff of a constitutional right. *See Rendell-Baker v. Kohn,* 457 U.S. 830, 838 (1982); *Rodriguez v. Phillips,* 66 F.3d 470, 481 (2d Cir. *1995).* "[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983," and can occur by direct participation in the alleged violation, a supervisory official's failure to remedy a wrong, a supervisory official's creation of a policy or custom under which unconstitutional acts occurred, or through a supervisory official's gross negligence in managing his subordinates. *Williams v. Smith,* 781 F.2d 319, 323-24 (2d Cir. 1986) (quoting *McKinnon v. Patterson, 568* F.2d 930, 934 (2d Cir. 1977)). In order to impose liability under § 1983 on a municipality or municipal agency, a plaintiff must prove that a "municipal custom or policy" caused the violation of his constitutional rights. *See Dwares v. New York,* 985 F.2d 94, 100 (2d Cir. 1993). "A single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy." *Id.*

Because Dyno does not distinguish between the actions of Defendant Lewis and the Village and, with respect to Lewis, argues only that Lewis, as mayor, was responsible for imposing the municipal custom or policy, the claim turned on Dyno's ability to show a municipal custom or policy. The district court properly found that Dyno had failed to allege an officially adopted custom or policy because Dyno did not make any allegation that it was the official policy of the

Village to refuse to enforce zoning regulations or to rely on allegedly improperly obtained state court judgments. Dyno argued only that the Village misinterpreted the relevant zoning provisions and subsequently relied on a state court judgment to affirm those misinterpretations and deny his complaints about the Greens' actions. To the extent that Dyno contends that he should be allowed to amend his complaint, he has failed to demonstrate that he would be able to amend the complaint to state a claim that would survive dismissal. *See Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 76 (2d Cir. 1998).

Moreover, the district court could have denied the claims on *res judicata* grounds because a state court judgment will have a preclusive effect on a subsequently filed § 1983 action where the § 1983 claims could have been raised in the state court action. *See Collard v. The Inc Vill of Flower,* 759 F.2d 205, 207 (2d Cir. 1985). In *Collard,* we held that a § 1983 **suit** alleging constitutional violations based on a municipality's rulings on zoning issues was barred where the municipality's decisions had previously been challenged in Article 78 proceedings in state court because the constitutional claims could have been brought in state court. *Id.* at 206-07. *Collard* is indistinguishable from the instant case, as Dyno clearly could have raised his claims regarding the Village's alleged municipal policy in his Article 78 proceedings.

For the foregoing reasons, we AFFIRM the district court's September 27, 2004 judgment and DISMISS the appeal as to the October 13, 2006 order.

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: s/Olivia M. George

Oliva M. George, Deputy Clerk

United States District Court
Northern District of New York

CIVIL JUDGMENT

Thomas Lamont Dyno

v. 3:O1-cv-321
(NAM/DEP)

Village of Johnson City, et al.

[X] Decision by Court. This action came to trial or hearing before the Court.

The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendant's Motion to Dismiss is granted and Plaintiffs Amended Complaint is dismissed in its entirety.

All of the above pursuant to the order of the Honorable Norman A. Mordue, dated the 27th day of September 27th, 2004.

DATE SEPTEMBER 27th. 2004

LAWRENCE K. BAERMAN
CLERK OF COURT

s/ Kara Looney

KARA LOONEY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
****

THOMAS LAMONT DYNO,

Plaintiff,

v 3:01-CV-0321

The Village of Johnson City; and
Harry G. Lewis, Mayor

Defendants

****

Appearances: Of Counsel

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Coughlin & Gerhart LLP Todd D Kilpatrick
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Norman A Mordue - District Judge

Memorandum Decision and Order

I. Introduction

Presently before the Court is a motion by defendants to dismiss plaintiff's amended *pro se* complaint. Plaintiff is a well-known litigant in the state courts having brought a series of *pro se* actions and proceedings before administrative agencies and state courts over the last eight years. These suits have arisen from a dispute with the Village of Johnson City zoning board over the installation of a basketball

backboard and hoop by Daniel and Mary Lou Green, former neighbors of plaintiff on their adjacent property. *[2]* Plaintiff complained to the Village's Code Enforcement Office that the basketball structure was constructed too close to his property and that the noise associated with it was a nuisance. Having lost on the merits of this claim before the Zoning Board of Appeals and the New York State Supreme Court Appellate Division via a 1996 Article 78 petition, plaintiff commenced suit against the Village of Johnson City itself, alleging that the Village's refusal to file criminal complaints against the Greens was a violation of his due process rights under the constitution and constituted intentional infliction of emotional distress. From the outset of this unfortunate conflict with his former neighbors, plaintiff's complaints regarding alleged zoning code violations by the Greens and alleged nefarious conduct on the part of the courts, various lawyers, Village officials, etc., have been conclusively determined to be without merit.[1]

Plaintiff brings the present federal action alleging violation of his constitutional rights under 42 U.S.C. § 1983 based on the same factual allegations which have been the subject of his many state court proceedings. Specifically, plaintiff asserts that defendants are liable pursuant to *Monell v. New York City Dep't. of Soc. Servs.*, 436 U.S. 658 (1978). Defendants move for dismissal arguing that plaintiffs' claims have already been determined against him on the merits in the courts of New York State and are thus barred by *res judicata* and collateral

[1] *See Matter of Dyno v. Vill. of Johnson City, et al.* No. 96-2033 (N.Y. Sup. Ct., Broome Co. Feb. 3, 1997, Rose. J.),

aff'd 261 A.D.2d 783 (3d Dep't 1999), *appeal dismissed 93* N.Y.2d 1033 (2000), *lv. denied* 94 N.Y.2d 818 (2000); *Matter of Dyno v. Lewis I, et al.* Nos. 98-1345/98-1650 (N.Y. Sup. Ct., Broome Co. Sept. 23, 1998, Rose. J.), *appeal dismissed 94* N.Y.2d 869 (2000), *lv. to appeal denied 94* N.Y.2d 941 (2000); *Matter of Dyno v. Rose,* 260 A.D.2d 694 (3d Dep't 1999), *appeal dismissed 93* N.Y.2d 998 (1999), *lv. denied* 94 N.Y.2d 753 (1999); *Matter of Dyno v. Vill. of Johnson City, 255* A.D.2d 737 (3d Dep't 1999); *Matter of Dyno v. Hillis,* 274 A.D.2d 908 (3d Dep't 2000), *appeal dismissed, 95* N.Y.2d 958 (2000), *lv. to appeal denied,* 96 N.Y.2d 706 (2001), *motion to vacate denied,* 96 N.Y.2d 880 (2001); *Matter of Dyno v. Lewis II, et al.* Nos. 98-1345/98-1650 (N.Y. Sup. Ct., Broome Co. June 26, 2001, Hester. J.), *aff'd* 300 A.D.2d 784 (3d Dep't 2002), *iv. to appeal dismissed* 99 N.Y.2d 651 (2003).

[3]estoppel. In the alternative, defendants contend that plaintiff has failed to state any viable federal claims in the amended complaint.

II. DISCUSSION

The present action names the Village of Johnson City and duplicatively,[2] its mayor, Harry Lewis, in his official capacity and alleges that defendants are liable to plaintiff under 42 U.S.C. § 1983. The first cause of action asserts that defendants violated plaintiff's constitutional rights when, in reliance on the Supreme Court's dismissal of his Article 78 petition, they refused to enjoin the Greens' children from using their basketball hoop or prosecute the Greens for code

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[2] *See Kentucky v. Graham,* 473 U.S. 159, 167 n. 14 (1985) ("There is no longer a need to bring official-capacity actions against local government officials, for under *Monell* ... local government units can be sued directly for damages and injunctive or declaratory relief").

violations. In the second cause of action, plaintiff alleges that defendants violated his constitutional rights by opposing legally his civil action seeking a temporary restraining order to restrict the Greens' use of their land and basketball hoop pending his appeal of Judge Rose's February 3, 1997, order of dismissal. Plaintiff also asserts in the second cause of action that defendants prevented him from perfecting his appeal of Judge Rose's second decision in September 1998, which granted a motion by defendants to enjoin plaintiff from pursuing additional civil actions against them without retained counsel or leave of court. Finally, in the third cause of action, plaintiff asserts that defendants violated his unspecified constitutional rights when they obtained the aforementioned injunction preventing him from filing further baseless legal actions against them.

In the first instance, defendants contend that plaintiff's claims are barred by longstanding principles of issue and claim preclusion. Under res judicata, a final judgment on the *[4]* merits bars further claims by parties or their privies based on the same cause of action. *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1877); *Lawlor v. Nat'l Screen Service Corp.,* 349 U.S. 322, 326 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621-624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Tent. Draft No. 1, Mar. 28, 1973) (merger); *id.,* § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5, (1979). The Court understands the

frustration of the attorneys for defendants herein who have expended considerable time and money defending lawsuit after lawsuit filed by plaintiff in the state courts against defendants in addition to Judge Rose, various lawyers and Village officials who have taken a position in opposition to plaintiff over the last eight years. Indeed, it appears to the Court that the present complaint is no more than an attempt by plaintiff to reargue and relitigate issues, which have been previously, decided against him. However, contrary to defendants' arguments, plaintiff's present amended complaint is not barred by the doctrines of res judicata or collateral estoppel because the prior actions were not brought pursuant to or considered under 42 U.S.C. § 1983. Nevertheless, plaintiff's action is subject to dismissal on other grounds.

Defendants' alternative argument that plaintiff has failed to state valid claims against them pursuant to 42 U.S.C. § 1983 fairs better. The law is clear that personal involvement is a prerequisite to an award of damages against an individual defendant in an action arising under 42 U.S.C. § 1983. *See Williams v. Smith,* 781 F.2d 319, 323 (2d Cir. 1986). Individuals are liable under § 1983 in their personal capacity only if they were personally responsible for violating a plaintiff's rights or promulgated unconstitutional policies or plans or otherwise *[5]* authorized or approved misconduct under circumstances indicating deliberate indifference. *See id.; see also Rizzo v. Goode,* 423 U.S. 362, 371 (1976); *Meriwether v. Coughlin,* 879 F.2d 1037, 1048 (2d Cir. 1989); *Duchesne v. Sugarman* , 566 F.2d 817, 831 (2d Cir. 1977). In the present case, there are no factual averments demonstrating what, if anything, defendant Harry G. Stevens did personally in

furtherance of violating plaintiff's constitutional rights or failing to prevent the defendant Village from allegedly doing so. Thus plaintiff's claims against defendant Stevens in his personal capacity must be dismissed.

Insofar as plaintiff claims the Village is liable for violation of his constitutional rights, his claim does not meet the criteria set forth in *Monell v. Dep't of Soc. Servs. of the City of New York,* 436 U.S. 658 (1978), because he does not establish any incidents of substantive fact to demonstrate a municipal policy or custom which resulted in alleged constitutional violations. In *Monell,* the Supreme Court reviewed the legislative history of 42 U.S.C. § 1983 and concluded that Congress did not intend to impose broad liability on municipalities. *See* 436 U.S. at 690. It thus follows that under § 1983, a municipality may not be held liable for the acts of its employees based solely on a theory of respondeat superior. *See Monell,* 436 U.S. at 690-91. It is only when the municipality, through the execution of its policies, actually deprives an individual of his constitutional rights that it is liable for the injury. *See id.* at 692. Moreover, it is necessary that the policy or custom be made by one "whose edicts or acts may be said to fairly represent official policy.' *Id.* at 694. Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the unlawful action of which a plaintiff complains. *See, Pembaur v. Cincinnati,* 475 U.S. 469, 481 (1986). Finally, to establish municipal liability, the policy must actually cause the violation of constitutional rights; it must be the moving force behind the violation. *See Monell,* 436 U.S. at *[**6**]* 692

A review of the municipal "policies' alleged in this

case illustrates the conclusory and speculative nature of plaintiff's claims. Moreover, the Court notes the absence of evidence demonstrating that plaintiff suffered any deprivation of clearly established constitutional rights. Plaintiff specifies neither the nature of the constitutional rights alleged to have been infringed here, nor the actual municipal policies alleged to have caused the infringement.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss plaintiff's amended complaint is hereby GRANTED.

IT IS SO ORDERED.

Dated: September 27, 2004 Syracuse, New York

S/ Norman A. Mordue
Norman A. Mordue
District Judge

OLD BUSINESS

APPEAL OF DECISION -
CODE INTERPRETATION
THOMAS DYNO 46 ACADEMY STREET

Vice-Chairman Patrick advised Mr. Dyno that the additional paperwork that he gave to the Deputy Village Clerk on June 17 is placed on file.

A motion was made by Dr. Holowinski and seconded by Mrs. Sacco to affirm the Code Enforcement Officer's interpretation based on the following reasons:

1) the setback rule applies to buildings and not structures and this is a structure and not a building according to the Zoning;

2) the setback, if it was even considered a building would not be a problem based on the average side setbacks within the block of this house and most of the houses have a setback problem:

3) the complaint of Mr. Dyno's apparently is more in the nature of the activity that is going on, the bouncing of the balls, the bouncing of the ball against the house, this is not a zoning issue.

Motion carried Vote: Yes — 4 No - 0 Absent — 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
****

THOMAS LAMONT DYNO,

Plaintiff,

v 3:01-CV-0321

The Village of Johnson City; and
Harry G. Lewis, Mayor

Defendants

****

Appearances: Of Counsel

Thomas Lamont Dyno - Pro se
46 Academy Street
Johnson City, New York
13790-1519

Coughlin & Gerhart LLP Todd D Kilpatrick
Attorneys for Defendants
20 Hawley Street
P.O. Box 2039
Binghamton, New York
13902-2039

Norman A Mordue - District Judge

ORDER

This Court having dismissed plaintiffs amended complaint by Memorandum-Decision and Order dated September 27, 2004, for failure to state any legally viable cause of action pursuant to Fed. R. Civ. P. 12(b)(6), and plaintiff having moved for relief from judgment pursuant to Fed. R. Civ. P. 60(b), and the Court having reviewed plaintiff's moving papers and having determined that plaintiff failed to identify the specific provision of Fed. R. Civ. P. under which he seeks relief; and the Court having further concluded

that plaintiff's moving papers do not otherwise demonstrate mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud were factors affecting this Court's award of final judgment to defendants herein; and the *[2]* Court having further concluded that the final judgment in question is neither void nor inequitable; and the Court having further concluded that plaintiff's moving papers fail to demonstrate extraordinary circumstances warranting relief from judgment, it is hereby

ORDERED that plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) is hereby DENIED.

IT IS SO ORDERED.

Dated: October 13, 2006
Syracuse, New York

S/ Norman A. Mordue
Norman A. Mordue
Chief United States
District Court Judge

US COURT OF APPEALS 2d CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE: NEW YORK 10007

Catherine O' Hagan Wolfe
CLERK

Date:

Docket Number: 04-5747-cv
Short Title: Dyno v. Village Johnson City
DC Docket Number: 01-cv-321
DC: NDNY (BINGHAMTON)
DC Judge: Honorable David Peebles
Honorable Norman Mordue

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ___ day of two thousand seven.

Dyno v. Village of Johnson City

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Thomas Lamont Dyno. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Catherine O' Hagan Wolfe, Clerk
By: S/ Molly A. Guptill
Motion Staff Attorney
Molly A. Guptill

NYS Village Law § 4-400. Mayor

1. It shall be the responsibility of the mayor:

a. to preside at the meetings of the board of trustees, and may have a vote upon all matters and questions coming before the board and he shall vote in case of a tie, however on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote;

b. to provide for the enforcement of all laws, local laws, rules and regulations and to cause all violations thereof to be prosecuted;

c. to appoint all department and non-elected officers and employees subject to the approval of the board of trustees however, the mayor may delegate the power to appoint certain employees to other village officers and employees;

d. to institute, at the direction of the board of trustees, all civil actions in the corporate name of the village;

e. to exercise supervision over the conduct of the police, and other subordinate officers of the village;

f. to intervene in any and all actions, at the direction of the board of trustees, where deemed necessary to protect the rights of the village and its inhabitants;

g. to serve as an ex officio officer member of each separate board of commissioners;

h. to appoint one of the trustees as deputy mayor at the annual meeting, who, during the absence or inability of the mayor, is vested with all the powers and may perform all the duties of the mayor;

i. to execute all contracts in the name of the village;

j. to sign orders to pay claims with the village clerk or deputy village clerk when authorized by the board of trustees when the same individual serves as both clerk and treasurer or deputy clerk and deputy treasurer;

k. to sign checks in the absence or inability of the treasurer or deputy treasurer, if any, when authorized by the board of trustees by resolution, or local law, and a certified copy of such resolution or local law shall be notice to the depository of such authorization;

l. to cause all claims to be thoroughly investigated and for such purpose he shall have the power to issue subpoenas to compel the attendance of the claimant or any other person or persons to appear, to be sworn or affirmed and to testify before him or the village clerk or the village counsel relative to such claim, and when so sworn or affirmed to answer as to any facts relative to the justness of such claim. The result of such examination shall be reported to the board of trustees. Subpoenas issued pursuant to this section may be served at any place within the state of New York in the same manner as subpoenas issued out of the supreme court are served. This subsection shall not be applicable to claims which are included within the provisions of section fifty-b of the general municipal law;

m. to issue all licenses and for such purpose shall be the "licensing officer" unless he designates another village officer which designation shall be filed with the village clerk.

2. If the mayor and deputy mayor are both absent or unable to perform the duties of the office, the trustees

shall appoint one of their number to act as deputy mayor during the absence or inability of the mayor and deputy mayor appointed by him.

NYS Village Law § 4-412. The board of trustees

1. General powers of the board of trustees. In addition to any other powers conferred upon villages, the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works. The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions.

NYS Village Law § 7-700. Grant of power

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of

yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land & trade, industry, residence or other purposes. As a part at the comprehensive plan and design, the village board is empowered by local law, to regulate and restrict certain areas as national historic landmarks, special historic sites, places and buildings for the purpose of conservation, protection, enhancement and perpetuation of these places of natural heritage. Such regulations shall provide that a board of appeals may determine and vary the application in harmony with the general purpose and intent, and in accordance with general or specific rules therein contained.

NYS Village Law § 7-712. Zoning board of appeals

1. Definitions. As used in this section:

(a) "Use variance" shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.
(b)"Area variance" shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

2.Appointment of members. Each village board of trustees which adopts a local law and any amendments thereto pursuant to the powers granted by this article shall create a board of appeals consisting of three or five members as shall be determined by such local law. The mayor shall appoint the board of appeals and the chairperson thereof subject to the approval of the board of

trustees.

NYS Village Law § 7-712-b. Permitted action by board of appeals

1. Orders, requirements, decisions, interpretations, determinations. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

2. Use variances. (a) The board of appeals, on appeal from the decision or determination of the administrative officer charged with the enforcement of such local law, shall have the power to grant use variances, as defined herein. (b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is

unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

(c) The board of appeals, in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proved by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

3. Area variances. (a) The zoning board of appeals shall have the power, upon an appeal from a decision or determination of *the* administrative official charged with the enforcement of such local law, to grant area variances as defined herein. (b) In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged

difficulty was self-created which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

(c) The board of appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

4. Imposition of conditions. The board of appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property'. Such conditions shall be consistent with the spirit and intent of the zoning local law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

Zoning Local Law: §274-32. Uses permitted.

A. In Residential 6,000 Districts (R6), the following uses are permitted:
(1) One-family dwelling.
(2) School.
(3) Religious institution.
(4) Public outdoor recreation,
(5) Enclosed accessory building use.

B. The following uses are permitted upon approval and recommendation by the Planning Board and after issuance of a special permit by the Village Board:
(1) Home occupation.
(2) Public utility building.

(3) Hospital.
(4) Community center.
(5) Professional residence office
(6) Two-family dwelling.
(7) Medical office [11.19-1985 by LL No. 21.1985]

§274.33. Area, yard, coverage, height and supplementary regulations. In Residential 6,000 Districts (R6), the following area, yard, coverage, height and supplementary regulations shall apply:

Dimension	Residential Uses	Non-Res
Min. lot area	6,000 square feet	30ksq. ft
Min. lot frontage	50 feet	125 feet
Min. lot depth	120 feet	150 feet
Min. front yard	25 feet	40 feet
Min. rear yard	25 feet	40 feet
Min. side yard each side	Total 12 feet; minimum 5 feet	40feet
Max. coverage	30%	25%
Max. bldng. height	3 stories or 35 ft., the lesser of	
Accessory building	18 feet	

ARTICLE III
Board of Appeals

§ 274.15. Creation; composition; appointment and term of members; rules of conduct and procedure [Amended 9494989 by LL No. 4-1989; 12214993 by L.L. No 1.1993]

The Village Board, pursuant to the provisions of 7-712 of the Village Law, hereby creates and appoints a Board Of Appeals The Board shall consist of five (5) members, each to serve a five-year period. The Board, subject to the provisions of the Village Law, shall determine its own rules of conduct and procedure.

§ 274-16. Powers and duties

The Board of Appeals shall have all the following powers and duties:

A. Interpretation: upon appeal from a decision to decide questions involving the interpretation of any provision of this chapter.

B. Issuance of special permits: to Issue special permits required by this chapter.

C. Use variances. [Amended 4-21.1975 by L.L. No. 8.1975; 9-19-1989 by LL No. 4-1989]

(1) Where there Is unnecessary hardship created by carrying out the strict letter of this chapter as to permitted use of a building or land, the Board of Appeals may vary the use regulations so that the spirit of this chapter shall be observed. No use variance shall be granted by the Board of Appeals, however, unless it finds that all of the following conditions apply:

(a) Economic return. That the applicant is deprived of all economic use or benefit from the property In question (which deprivation must be established by competent financial evidence) if the property is used only for a purpose permitted In the district. Proof of a more profitable return if the variance is granted is not, in itself, evidence of hardship. [Amended 12.21.1993 by L.L. No. 1-1993]

(b) Unique Circumstances. That unique circumstances exist for the building or land In question which are not generally found throughout the district and which deprive the applicant of the reasonable use of such building or land.

(c) Neighborhood character. That granting the variance will be in harmony with the spirit and intent of this chapter and will not alter the essential character or quality of the neighborhood, endanger public health or safety or substantially diminish or impair property values in the neighborhood.

(2) The granting ' of a use variance does not relieve the applicant of the responsibility for meeting requirements permitted uses in the applicable district.

D. [Added 9-19-1989 by L.L. No. 4.1989; amended 12.21.1993 by L.L. No 1.1993] Area variances. The Zoning Board of Appeals shall have the power, upon appeal from a decision or determination of the Enforcement Officer, to grant area variances from the area or dimensional requirements of this chapter in accordance with the Village Law.

E. A self-imposed hardship or physical condition problem shaft not constitute a valid cause for granting a variance. [Added 9.19-1989 by L.L. No. 4.1989]

F. In granting any variance, the Board of Appeals shall prescribe conditions that it deems to be necessary or desirable. Any variance granted shall be to a specific person and shall be limited to the particular use which is contained in the petition for such variance. (Added 9-19-1989 by L.L. No. 4-1.989]

§ 274.17. Applications and appeals to Board.

A. Form and contents. The Board of Appeals shall act in strict accordance with the procedure specified by this chapter. All appeals and applications made to such Board shall be in writing on forms prescribed by the Board. Every appeal or application shall refer to

the specific provision of the chapter involved and shall set forth the interpretation claimed, the use for which the special permit is sought or the details of the variance that is applied for and the grounds on which it is claimed that the variance should be granted.

B. Advisory opinion of Planning Board. At least ten (10) days before the date of the public hearing, the Secretary of the Board of Appeals shall transmit to the Planning Board a copy of the application filed. The Planning Board shall submit a report of its advisory opinion prior to the date of the hearing Failure of the Planning Board to submit a report shall be deemed to signify approval of the application or appeal. (Amended 9-19-1989 by L.L. No. 4-1989]

Decisions of Board. Every decision of the Board of Appeals shall be by resolution, which shall contain a full record of its findings in the case.

D. An appeal for a variance shall be accompanied by a fee of fifty dollars ($50.). [Added 10.20-1973 by IL. No. 20.1915; amended 34.1990 by L.L. No. 3.1990]

ARTICLE IV

Special Permits §274.18. Application requirements. [Amended 10.20.1975 by IL. No. 21-1975: 3-64990 by L.L. No. 3.1990)

An application for a special permit shall be accompanied by a fee of fifty dollars ($50.), three (3) sets of preliminary plans and other descriptive matter to portray clearly the intention of the application. These documents shall become a part of the record. Such plans shall show the location of all buildings, parking, access and circulation, open space, landscaping and other information necessary to determine if the proposed special use meets the

requirements of this chapter.

§214.19. Planning Board recommendations; public hearing required. [Amended 4.21.1 975 by LL No. 7.1975]

In every case where a special permit is required by this chapter, either by the Village Board or the Board of Appeals, such permits will be granted only after:

A. Referral to the Planning Board for its recommendation and the receipt of its report.

B. A public hearing has been held.

§ 274-20. Prerequisites to Issuance. (Amended 249-1985 by L.L. No. 4-1985]

Special Permits required to be issued by the Zoning Board of Appeals may be issued only after the Zoning Board of Appeals has found that all the following standards and conditions have been satisfied:

A. The special use possesses characteristics of unique and special form to warrant its consideration as an individual case.

B. The location, size of the use and structure, nature and intensity of the operations involved, size of the site in relation to it and the location of the site with respect to the streets giving access to it are such that it will be in harmony with the orderly development of the district.

C. The location, nature and height of buildings, walls and fences will not discourage the appropriate development and use of adjacent land and buildings or impair their value.

D. The special use shall not conflict with any Master

Plan or part thereof.

E. Operations of any special use shall not be more objectionable to nearby properties than would the operations of any permitted use.

§ 274-21. Additional standards.

The Planning Board may recommend in its report on the granting of a special permit that additional standards be imposed on the special use to provide adequate safeguards to protect the health, safety, morals or the general welfare of the public and for preservation of the general character of the neighborhood in which such proposed special use is to be placed to minimize possible detrimental effects of the use on adjacent property.

§ 274-22. Existing violations,

No special permit shall be issued for a special use for a property where there is an existing violation of this chapter.

§ 214-23. Transferability and expiration of special permit.

A special permit is not transferable and shall authorize only one (1) special use and shall expire if the special use ceases for more than three (3) months for any reason.

ARTICLE V
District Regulations

§ 274-24. Application of district regulations.

A. Except as hereinafter provided no building or structure shall be erected, moved, altered or extended and no land, building or structure part thereof shall

be occupied or used unless in conformity with the regulations herein specified for the district in which it is located.

B. The regulations established herein shall not apply to existing buildings and structures, nor to the existing use of any building, structure or land to the extent to which it was used at the time of enactment of the ordinance from which the provisions of this chapter are derived. However, this chapter shall apply to any change in use, alteration, extension or movement of a building or structure and to any change in use of land subsequent to the enactment of said ordinance.

§ 274-25. Districts established.

For the purposes of this chapter, the village is hereby divided into the following zoning districts:

Conservation Area Districts	AC
Residential 9,000 Districts	R9
Residential 6,000 Districts	R6
Residential 4,000 Districts	R4
Multiple Residential Districts	RM
Neighborhood Commercial Districts	CN
General Commercial Districts	CO
Industrial Districts	IN
Highway Development Districts	HD
Mobile Home Park Districts	MHP
Planned Unit Development Districts	PD

NYS CPLR 7804"(f) Objections in point of law. [last sentence] "The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard"

NYS CPLR 7804"(h) Trial. If a triable issue of fact is raised in a proceeding under this article it shall be tried forthwith".

United States District Court
Northern District of New York

~~~~~~~~~~~~~~~~~~~~~~~~

THOMAS LAMONT DYNO *Plaintiff*	**AMENDED COMPLAINT**
v.	
The Village of Johnson City — Harry G. Lewis, Mayor & Daniel W. Green III and Mary Lou Green — Adjacent property owners *Defendant(s)*	**Monell Action** Pursuant to 42 USC § 1983 Civil Case # 3:01-C V-0321 (NAM)(GLS)

~~~~~~~~~~~~~~~~~~~~~~~~

As A First Cause of Action Plaintiff
Thomas Lamont Dyno Alleges:

1. **I/K** That this is a civil action brought pursuant to 42 USC § 1983 and the case law of **Monell, et al. *v.*** DSS **of** NYC 436 US *658,56* L. Ed. 2d 611, 98 S. Ct. 2018 and **Owens *v.* City of Independence** Missouri, **et al.** *445* US 622, 63 L. Ed 2d 673; 100 S. Ct. 1398 @ US *659* note 39 (citing Monell @ U.S. 690):

"Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other § 1983 'person' may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom

has not received formal approval through the government's official decisionmaking channels"

Seeking monetary, declaratory and injunctive relief against the unconstitutional implementation and execution of a municipal zoning ordinance based upon a decision officially adopted as policy of said municipality by the mayor thereof. The court has jurisdiction over this action pursuant to 28 USC §§ 1331, 1342(3) and (4) and 2201.

The Parties and Properties

2. **I/K** At all times stated herein Plaintiff Thomas Lamont Dyno has continually possessed and used the rooms on the first floor of his parents residence at 46 Academy Street Johnson City, New York 13790, where he sleeps and takes his meals:

(A) Said residence is situated on a 40' wide lot with a driveway parking area occupying the North side remainder and a 3' sideyard occupying the South side remainder;
(B) Thomas Lamont Dyno is a member of the President's Counsel of the World Jewish Congress.

3. **D** Plaintiff's continuous possessory property rights in said use of rooms are protected and secured under the 14th Amendment to the U.S. Constitution from deprivation by persons acting under color of NYS law.

4. **A** At all times stated herein defendant Village of Johnson City, New York is a municipality incorporated under ¶7 of NYS Village Law, Chapter 64 of the Consolidated Laws; Laws 1972, Chapter 892

5. **A** That at all times stated herein, Harry G. Lewis is the Mayor of the Village of Johnson City, New York.

6. **I/K** At all times stated herein Daniel W. Green III and Mary Lou Green hereinafter referred to as "the Greens" and as evidenced by deed were and continue as the owners of the 42 Academy Street property under mortgage by the U.S. Dept. of Housing and Urban Development (H.U.D.):

(A) Said residence is located on 1 & 1/2 lots having a total width of 60' with (i) the North side remainder occupied by a driveway parking area with (ii) more than '/2 lot occupying the South side remainder, with the distance between the next adjacent residence on said South side another 1/2 lot away.

(B) That at times stated herein Daniel W. Green III was in possession of said property and Mary Lou Green was not.

7. **I/K** At the present time the whereabouts of both Daniel W. Green III and Mary Lou Green are unknown but (A) their son Shaunesey P. Green moved back into adjacent property after it was abandoned by all occupants for a period of two years and (i) appears to be a skinhead *(cf* par. 2(B) *supra)* by shaved head and anti-social behavior (see par. 47 *infra)* with (ii) said premises frequented by other apparent skinheads (iii) two of whom plaintiff saw wearing what appears to be the skull and dagger tattoo and (B) upon information provided by the Anti-defamation League and belief such information is reliable said tattoo signifies that the wearer has murdered a Jew.

Zoning Local Law

8. **Aw/Ex** Both aforesaid properties are located in said Village r(6) zoning district (a) hereinafter referred to as "r(6)", where uses of land allowed therein are specified under §274-33 A of the Code of the Village of

Johnson City with said Chapter 274 being the Village zoning ordinance, (b) hereinafter referred to as "the zoning ordinance".

Procedural History

9. **I/K** In 1995 and 1996 a zoning local law controversy arose over the Greens unreasonable use of land situated on the north side of their 42 Academy Street property involving: (a) their driveway parking area, which is approximately 8 to 10' wide, which with plaintiff's 3 foot sideyard is all that separates Greens' two story residential dwelling from plaintiff's two story residential dwelling *(see* pars. "2(A)" & "6(A)" *supra);* and (b) the conversion of said driveway parking area, which is a required use under the zoning ordinance, into a basketball court (c) facilitated by the permanent erection, without building permit, variance, notice or hearing, of a basketball basket "structure" (i) as defined by §274-4.B of the zoning ordinance definition of "structure" (hereinafter referred to as "the structure"): (ii) which is comprised of a sheet metal backboard 2' feet in width, of approximately the same height, with metal hoop and net attached thereto mounted onto a 4" diameter steel pole sunk and cemented into the ground approximately 11' feet in height from ground level.

(A) **I/K** The Village measured distance from the edge of the backboard to plaintiff's 3' sideyard is 3.1 feet:

(B) **D** That the tortious location of the facilitating structure on the North side of Greens property between the Greens and plaintiff's residences *(cf* pars. 6(A) and 2(A), *supra)* was done in retribution for plaintiff's successful prosecution at the Town of Union Justice Court against the Green's unlicensed nuisance

dogs, nocumentum and yard waste after the Village refused to take any action

10. **I/K** Previous to erection of the structure and after the Police reluctantly instructed the Greens to remove said backboard from having lashed it onto plaintiff's clothesline pole, the Greens noisily removed a collapsed "enclosed accessory building use" that was in violation of the *5'* set back rule and commenced to erect a pole for said backboard at the location of said building whereupon plaintiff's parents' attorney served a letter upon the Greens objecting to the contemplated use of land, declaring it unfair, depriving occupants of their property, requesting construction cease, threatening legal action but the Greens caring about no one but themselves ignored the notice and continued construction.

11. **A** Plaintiff complained of the Greens prospective use to the Mayor who informed plaintiff that former Village attorney William L. Gibson, Jr, instructed the Mayor to tell plaintiff that if the structure is *5'* feet or more from plaintiff's sideyard then it's a private matter between plaintiff and adjacent property holders whereafter the Village Police and mayor refused to take any further action, the construction was completed and the use of land put in action.

12. **D** Plaintiff sustained Special injurious damages from the use of land caused by unbearable, inescapable and maddening noise (and/or fear anticipating more of the same) directly, immediately and necessarily caused by the basketball(s) tapping on the hard pavement and reverberating about the closely situated smooth exterior surfaces of said dwellings and hard pavement: with the ball

sometimes scuffing plaintiff's aluminum siding and otherwise crashing against the metal backboard, sounding like galvanized garbage containers smashing together along with shouting, cheering, &c. all inescapably permeating through the entirety of plaintiffs 30' wide home situated on a 40' wide lot reducing the use of his home to hardly more than a mere shelter from the elements in something akin to a small noisy warehouse, making relaxation, reading, &c., impossible with the Greens alienating plaintiff him from his land by the Greens violation of the maxim *sic uteri tuo ut alienum non loedas* and thus depriving plaintiff of his enjoyment of life and property without due process of law.

13. **Aw/D** Plaintiff had filed a complaint with the Village Code Enforcement Officer who determined that if the use is not expressly proscribed by the zoning ordinance then it's allowed and whereas said determination is contrary to the express language of the Village zoning ordinance definition of "permitted use" plaintiff appealed from the CEO's determination to the Village Zoning Board:

14. **I/K The** gravaman of plaintiff's zoning board appeal from the Village Code Enforcement Officer's determination was

(A) That the Greens' willful, intentional and knowingly illegal use of their land at said 42 Academy Street property (hereinafter referred to as "use of land") constituted a violation under a strict construction of the zoning ordinance: that said use and structure within § 274-4.B of zoning ordinance definitions of "use", "permitted use" and "structure" and § 274-32-A ibid, is not allowed on residential lots

in r(6) where both properties are located and in conjunction with § 274-24. A., NYS Village Law 20-2006 and NYS case law said use is a zoning violation subject to prosecution and injunction; and

(B) That said use of land and facilitating structure are arbitrarily sustained by Village discrimination against plaintiff for the benefit of the Greens while bearing no fair or substantial relation to any object of the zoning ordinance in violation of Plaintiff's entitlement to equal protection of his property rights under law as secured under the 14th Amendment to the U.S. Constitution; that said imposition against him by the Greens use of land constitutes an illegal servitude proscribed by the 13th Amendment to the U.S. Constitution depriving plaintiff of property protected under the 14th Amendment of the U.S. Constitution without due process of law.

15. **D** The zoning board avoided the gravaman of plaintiff's appeal grounded in "use" and issued a conclusory determination *without finding* that the use does not violate the area "set back rule". (A) But neither does a nuclear waste dump and

16. **A** On grounds that "area" as a matter of law cannot be dispositive of an illegal use complaint plaintiff petitioned the NYS Supreme Court under CPLR ¶78 for mandamus to review as authorized by NYS Village law §7-712-c and

(A) On February 3, 1997 NYS lAS JSC Robert S. Rose ordered entry of his decision in the Matter of Julia Dyno, Thomas Lamont Dyno and Carol Cass against the Village of Johnson City, the Village of Johnson City Zoning Board of Appeals, Daniel W. Green HI and Mary Lou Green wherein plaintiff herein

appeared as petitioner in person joined by his Mother Julia Dyno and his wife Carol S. Cass:

17. **D** Said decision of the NYS Supreme Court declaring in violation of the strict construction doctrine that the use of land is not a zoning violation is an unauthorized act in excess of said JSC's mandamus to review jurisdiction; and

(A) was based upon grounds not invoked by the board supported by (i) misrepresentation of the Village zoning ordinance and (ii) *de hors* matter never served upon plaintiff:

(B) was facilitated by said JSC proceeding in violation of plaintiff's procedural due process rights by invoking *sua sponte* summary judgment motion, without notice, during reservation of judgment on Village Attorney's challenge to plaintiff's duly served amended petition: whereby plaintiff was deprived of his right to know what matter the court considered properly before it to raise a triable issue or a matter of law; and

(C) is by irregular procedure on *de novo* grounds without notice or due process hearing to the substantial prejudice of plaintiff's right under NYS law to a private injunction action to enjoin said zoning violation and

(D)A wrongful attempt to limit and condition plaintiff's action by dismissal of his NYS **CPLR** ¶78 action without prejudice to a tort action against the *nihil dicit* Greens with the *defacto* result of sustaining the use of land complained of.

(E)Is inequitable as the worst fate for the Village was costs upon annulment of the determination *see* NYS Village Law §7-712-c yet the court preserved the sole

means for the Village to persecute plaintiff by sustaining said use of land while leaving plaintiff, subject to the NYS lAS, to prove that said use allowed to continue by lAS JSC Rose's decision is a nuisance.

18. **I/K** Plaintiff appealed from said order and during the interim period the use of land complained of was discontinued by the Greens for a period of 9 months, which is the maximum time provided by the NYS Supreme Court Appellate Division 3rd Dept. to perfect an appeal without an order from that court granting an extension of time; but

(A) At various times, therein, the driveway was used by Shaun Green and his friends knowingly and with the acquiescence of Daniel W. Green III in an equally annoying manner *inter alia* accommodating skateboard ramps with (x) a half dozen skateboards crashing about beneath plaintiff's windows with said use directly inspired by a case cited by JSC Rose in his aforesaid judgment involving 3.2 acre properties the sparsely populated wilderness Township of Lewisboro bordering State Forest Preserve and Vermont.

Effective Times and Occurrences of this Complaint

19. **I/K** On March 6, 1998 coinciding with entry of the NYS 3rd Dept. Appellate Division's extension of time for plaintiff to perfect said appeal:

(A) Said adjacent use of land was again put into action as a basketball court by the Greens' son Shaun Green (see par. 7, *supra)* and a group of his friends, with knowledge and acquiescence thereof by Daniel W. Green Ill whom at said time was possessor of said property while his former wife, Mary Lou Green (now going by the name of Mary Price) had abandoned the

premises together with her juvenile daughter; but *(see* par. 7, *supra);* and

(B) Immediately following recommencement of said use, the thoroughly unavoidable noise resulting therefrom was so distracting as to make it impossible for plaintiff to use his rooms for anything other than storage and protection from the natural elements and repleading par. 12 supra: reducing the residential character of plaintiff's property to something akin to a small noisy warehouse; and (i) with Shaun Green ignoring plaintiff's request to cease, (ii) complained to Village Police who refused to send a car explaining (paraphrase) 'we ain't gonna tell some kid he can't play basketball in his own yard' (iii) plaintiff phoned *inter alia* the NYS Supreme Court Appellate Division 3"~ Dept. at Albany to arrange an appointment to apply for a temporary restraining order and after the Appellate Division confirmed a meeting with JSC Paul J. Yesawich Jr. on March 10, 1998 at his chambers in Cortland, New York (iv) plaintiff complained to Harry G. Lewis, Mayor of the Village of Johnson City: at which time

(C) Mayor Lewis explained to plaintiff that it was the Mayor's decision to invoke said decision of NYS JSC Robert S. Rose *(see* pars. 16-17 *supra)* as justification for refusing to intervene or cooperate in any manner to enjoin said use of land until the matter could be decided on appeal or otherwise; (i) the Mayor also informed plaintiff that he instructed the Police to not intervene to stop said use and (ii) refused to enter a stipulation to allow plaintiff to bring an action to preliminarily enjoin the use of land as a zoning violation under NYS Village Law § 7-714, or otherwise.

(D) According to Owens *v.* City of Independence Missouri, *et al* 445 US 662, 100 S. Ct. 1938; 63 L. Ed. 673, the acts of the Mayor of a municipality acting in his capacity as Mayor *may fairly be said to represent official policy of said municipal corporation* and by Mayor Lewis invoking said decision of NYS JSC Robert S. Rose as justification for refusing to intervene or cooperate in any manner to enjoin said use of land until the matter could be decided on appeal: instructing the Police to not intervene to stop said use and refusing to stipulate to an action to preliminarily enjoin the use of land as a zoning violation: Mayor Lewis thereby adopted the decision, not of the Zoning Board (par. *15, supra),* but that of said JSC Rose as authority for implementation and execution of the Village zoning ordinance in regard to said properties *(see* pars. 2, 6 & 8, *supra)* and thus as a matter of official policy of the Village to sustain and impose said use of land against plaintiff; and that said official policy shall hereinafter be referred to as "said policy".

20. **D** As a continuation of par. 19, said decision of JSC Rose (pars. 16-17, *supra):* (a) is an act in excess of that court's mandamus to review jurisdiction which is relegated to the administrative hearing record and grounds invoked by the board — (i) granting said use on grounds other than those invoked by the board on matter *de hors* the administrative hearing record, depriving plaintiff of his right to reply *(see* par, 17, *supra)* and wrongfully prejudging a subsequent action for injunction plaintiff is entitled to under NYS law (ibid., par. 17 "(C)", *supra)* against Green's zoning violation — (**b**) is without due process of law.

21. **D** As a continuation of par. 20, said decision is

contrary to the strict construction of the zoning ordinance whose provisions in derogation of common law rights require a strict construction which both landowners having equal rights in their property and entitlement to equal protection thereof are entitled to:

22. **D** Village adoption of JSC Rose's said decision does not cure its lack of jurisdiction, errors of law and procedural irregularities as *inter alia* referred to in pars, 17, 20-21 *supra* said decision is generally devoid of due process and the Mayor's March 6, 1998 policy implementation and execution of the zoning ordinance, based on said decision willfully, intentionally and knowingly: (a) sustains and causes plaintiff to be subjected to the deprivation of rights secured by the U.S. Constitution and laws by an unauthorized use of land proscribed by the express language of the zoning ordinance to and for the sole benefit of adjacent property holders, the Greens, to plaintiff's special injurious damages and (b) obstructs plaintiff's right under NYS law to prosecute a private action for injunctive relief against said zoning violation:

23. **D** By the Greens use of land alienating plaintiff from his land (see par. 12, *supra)* said policy implementation and execution of the zoning ordinance by the Mayor (pars. 20-23) with the immediate, direct and necessary results thereof readily discernible to a person of average sensibilities insinuates the Village into a position of interdependence with the Greens in imposing their use of land as to subject plaintiff to the deprivation of his property without due process of law; and:

(A) That without said policy plaintiff would have his

action for injunction against the zoning violation (par. "17. (C)", *supra)*

24. **D** Said policy implementation and execution of the zoning ordinance in a manner as to impose said use of land knowingly to plaintiff's injurious damages and restricting his right of action is an arbitrary act having no fair or substantial relation to any object of the zoning ordinance or interest of the municipality and is based upon an illegal discrimination in *malicious* violation of plaintiff's entitlement to equal protection of his property rights secured under the 14th Amendment of the U.S. Constitution:

25. **D** That said discriminatory policy of the Mayor with joint participation by the Greens violates municipality's duty as a person(s) acting under color of the law of NYS jointly and severally to not violate the constitution; and said violation to the special injurious damages of the plaintiff in depriving him of equal protection of his rights under law and his property without due process of law is unconstitutional under the 14th Amendment to the U.S. Constitution:

26. **D** Said unconstitutional policy and ordinance implementation by persons acting under color of NYS law has subjected plaintiff to special injurious damages by deprivation of rights secured by the U.S. Constitution and laws and plaintiff's attempts to seek protection of these rights from March 10, 1998 and continuing into the present thwarted by arbitrary Village obstruction has further resulted in plaintiff's loss of treasure, opportunity costs and time lost that may never be regained to the amount of $ 100,000.00.

As a Second Cause of action
Plaintiff Thomas Lamont Dyno alleges:

27. **I/K** The Plaintiff Thomas Lamont Dyno realleges each and every allegation contained in this complaint numbered 1-25 inclusive.

28. **I/K** That on March 7, 1998 plaintiff served upon the attorney of record for the Village, Daniel W. Green III, Mary Lou Green and NYS JSC Paul J. Yesawich, notice of application for temporary restraining order and preliminary injunction against Green's use of land until the appeal was determined and plaintiff offered to file an undertaking for such purpose.

29. **I/K** Greens did not oppose the application and Justice Yesawich entertained presentation of the order on March 10, 1998 in his chambers at Cortland.

30. **D** On March 10, 1998 Mayor Lewis through his attorney Stephen M. Sedor vigorously and aggressively opposed plaintiff's otherwise unopposed application and announced that the Village would "step aside" if plaintiff sued the Greens for nuisance and not sue the Village otherwise the Village demanded the matter be noticed before the full court and the temporary restraining order denied:

31. **D** That *said policy* intervention depriving plaintiff of his rightful use of property as it is intended and allowed under the zoning ordinance in order to sustain the Greens use of land in a manner proscribed by strict construction of the zoning ordinance and to the injurious damages of plaintiff: bears no substantial relation to any interest or purpose of the municipality and insinuates the Village into a position of interdependence with the Greens, in the imposition of Green's use of land *(see* pars. 9-12, *supra)* as an

involuntary servitude proscribed by the 13th Amendment to the U.S. Constitution against and upon plaintiff's use and enjoyment of his property, depriving plaintiff of his property and liberty thereof, protected under the 14th Amendment of the U.S. Constitution, without due process of law.

32. **D** That said imposition deprived plaintiff a fair opportunity to perfect his appeal and rendered him a Village prisoner in his own home and subject to the Green from March 6, 1998 through the Summer of 1999, when the backboard was removed from the remaining structure and the premises were abandoned by all inhabitants (but see par. 7, *supra):*

33. **D** That said policy executed by the Mayor with joint participation by the Greens as persons acting under color of the law of NYS from March 6, 1998 through out the Summer of 1999 depriving plaintiff of his property and liberty thereof without due process of law and further depriving him of his liberty to practice the Cecchetti Method of Classical Theatrical Dance 6 hrs a day, 6 days a week as is required by his career choice by leaving him no choice than to seek protection of his liberty and property rights under law is to his injurious damage of $100,000.

As a Third Cause of action
Plaintiff Thomas Lamont Dyno alleges:

34. **I/K** That Plaintiff Thomas Lamont Dyno realleges each and every allegation contained in this complaint numbered 1-32 inclusive.

35. **D** That on November 12, 1998 Justice Paul J. Yesawich, Jr., affirmed for the unanimous court the February 4, 1998 order of NYS lAS JSC Rose's settlement of the appeal record ruling *inter alia* that

plaintiff's amendment setting forth a cause of action under 42 USC 1983 based upon matter appearing upon the face of the zoning board record *(see* par. 14 *supra)* was dismissed without prejudice.

36. **D** That on June 10, 1998 by virtue of the fact that plaintiff's appeal was still pending and that the fate of his amendment containing a cause of action under 42 USC § 1983 was uncertain plaintiff commenced a new action under 42 USC § 1983 in the Broome County Supreme Court limited to those occurrences on or after the date(s) set forth in pars, 19 & 30, *supra.*

37. **A** That on July *15,* 1998 attorney of record for the Village of Johnson City commenced an action against plaintiff seeking the following relief

"[T]he plaintiffs demand that the defendants be preliminarily and permanently enjoined from commencing any further legal action against Mayor Harry G. Lewis, the Village of Johnson City, its agents, servants or subdivisions, unless they are represented by competent legal counsel, or unless they first seek judicial approval, for the costs of this action, and for such other and further relief as to this Court is deemed just and proper";

The purported legal grounds asserted by opposing counsel for the relief demanded is this —

"[I]f the defendants are not restrained from pursuing any further legal action against the Village and the Mayor, the plaintiffs will suffer irreparable harm, including, but not limited to, excessive and unnecessary legal fees, and loss of time that could be spent addressing problems faced by the municipality".

(A) **D** Essentially the Village is praying equitable relief based upon a decision secured by misrepresentation and deceit.

38. **D** That NYS lAS JSC Rose by order of September 23, 1998 summarily dismissed plaintiff's action set forth in pars. 36 *supra* on grounds of municipal and discretionary immunity - viz., that any subsequent action challenging said use of land except a nuisance action against the Greens is barred Res Judicata by his previous extra-jurisdictional zoning decision (see pars. 16-17, *supra)* and granted the remaining relief without hearing:

"[D]efendants motion for a preliminary injunction is granted with plaintiffs being restrained from commencing any new action or proceeding against defendants unless they are represented by a licensed attorney or first receive the permission of the court"

39. **D** That plaintiff, as a person exercising his fundamental right of access to the courts of the United States for protection of their rights under the Constitution and laws with a complaint having an identity of issues dismissed without prejudice and affirmed as such by the Appellate Division does not serve as a rational basis in equity,, let alone compelling state interest, to enjoin him as such (pars. 37-38);

(A) Nor to impose arbitrary burdens and restrictions upon the exercise of his aforesaid fundamental rights without a due process hearing, which he is entitled to under the 14th Amendment of the U.S. Constitution:

40. **D** And to the extent that the Village sought such injunction in the Summer of 1998 never prosecuted the action yet *invoked* such so-called preliminary

injunction (NYS CPLR 6313 & 6301) on April 10, 2001 while threatening to sue plaintiff for $29,000.00 if the NYS Supreme Court vacated said judgment ordered the action referred to in par. 36 to proceed and if plaintiff went ahead with said action attests to its own self-defeat.

41. **D** The sole basis for these threats by Village counsel is the idea that there is no such thing as a Monell action and it's therefore frivolous to sue a municipality as such because JSC Rose has created the belief that the Village is blanketed by absolute municipal and discretionary immunity *(see* Owens *v.* Independence Missouri, Op cit. @ U.S. 652, n. 34) so unless the municipality seeks injunction against every person that brings suit against it then plaintiff is being singled out in an arbitrary manner as if he were the only person that ever sued the municipality.

42. **D** In terms of the irreparable injury rule, if an untried Monell action against a municipality having identity of issues similar to an amendment dismissed without prejudice results in an expenditure of municipal money to effectuate plenary dismissal then the remedy for the municipality is an action for damages or award of costs; but disposition on the question of liability with a full and fair opportunity to litigate that issue(s) comes 1st. Municipal expenditure in defence of §50 NYS General Municipal Law cases is axiomatic and does not constitute irreparable injury. The solution is to declare the *defacto* injunction an arbitrary act of government and therefore unconstitutional or merely allow plaintiff to show misrepresentation and deceit to defeat their *injunction* by invocation of the clean hands doctrine; otherwise the Village and Shaun Green (and/or the

Greens if/when they decide to move back) are free to repeat all of the past torts and depredations leaving the plaintiff with only three choices (A) Abandon his property without any compensation (B) surrender his due process rights to the notion of an absolute divine prerogative of a Judge or (C) play lawyer roulette until he's out of chips - *cf* NYS Civil Rights Law ¶2, § 10.

43. **D** From the time of plaintiff's zoning board appeal until judgment was entered on CPLR ¶78 mandamus to review thereof {(x) June '96 through February '97} the Village of Johnson City attorney Todd D. Kilpatrick prosecuted an equity foreclosure action on behalf of H.U.D. *(see* par, 6 *supra)* against the Greens under Broome County Clerk Index # 96-1276. The Greens defaulted *nihil dicit* and as the JSC was about to order foreclosure sale of Greens property Village attorney Kilpatrick voluntarily discontinued the action:

44. **A & D (see ans.)** In 1999 plaintiff brought a CPLR ¶ 78 proceeding against Binghamton City Court Judge John T. Hillis for his violation of NYS CPL §§ 170.10 and 170.30 in an action plaintiff commenced against former Village of Johnson City attorney William L. Gibson, Jr under §487 of the NYS Judiciary Law for willfully and intentionally misrepresenting plaintiff's administrative zoning board hearing record to NYS Supreme Court resulting in the Rose decision (see pars. 16-17, *supra)* wherein lAS JSC Rose extended his preliminary injunction against plaintiff to the Greens, who weren't even party to the proceeding and with no complaint for injunction (see NYS CPLR §6311. Ironically the only *nexus* was the fact that Mayor Lewis had the Village

attorney Todd D. Kilpatrick represent William L. Gibson, Jr., who Hillis refused to arraign, apparently to somehow ensure that Rose would uphold his decision based on misrepresentation and deceit for the benefit of the Village, Gibson and the Greens.

45. **D** Under the Village policy sought to be enjoined, a municipality may impose a servitude to the injurious damage of an adjacent property holder, either (a) by the municipality insinuating itself into a position of interdependence with the adjacent possessor's malicious imposition and deprivation complained of (b) achieving a similar result by threatening mortgage foreclosure, or by entering into a pact utilizing some other devious device against the tortfeasor(s) -e.g., dismissal of criminal charges, immunity to commit crime, exploitation of the NYS lAS to ensure immunity from civil action, &c., if the prospective joint tortfeasors, in this case the Greens *quid pro quo* do what the Village says;

46. **D** If the victim of said Village-the Greens combination could afford, to seek in time, and in, money to hire, *competent legal counsel* he would be paying several thousands of dollars to be before the same Judges he's already paid his fees to be before and the Village *action of non action* in failing to enforce the zoning ordinance, which Rose has led the Village to believe is their absolute prerogative in pseudo sanctuary. Under these aforesaid circumstances the victim is either paying an unscrupulous lawyer thousands of dollars to have a Judge bless the victim's property worthless for the purpose for which it was intended, in this case, residential habitation, or leaves the victim to surrender to the idea of a divine prerogative in a

Judge to waive due process. If lawyers, whose bread and butter is received by practice before said Judge, refuses to "take your money" (plaintiff's money) then this circumstance, by course places the victim, so situated, at the arbitrary whim of the municipality and its private person accomplice or else leaves the victim *free to travel* by abandoning his property without compensation —e.g., an arbitrary abuse of office to clear an area for private developers looking for no hassle bargain land —

(A) The terms of the preliminary injunction imposed upon plaintiff, based upon the totality of the circumstances of the case creates under color of the law of NYS State an arbitrary classification of the citizenry based upon financial viability and veritably the sort of property they own depriving the class of equal protection of our property rights under law, with said classification bearing no fair or substantial relation to any purpose of government — look Judge (doc, lawyer, millionaire) someone's depriving you of your use of property don't call us at local government go call a lawyer or we'll sue you.

47. **I/K** Throughout this entire duration of time and now recommencing since February 2001 with the return of Shaun Green *(see* par. 7 *supra),* the Greens have allowed and continue to allow their property to go to waste: the Village cuts their grass for them but have allowed three apple threes planted near plaintiff's property line to grow over into plaintiff's yard obstructing ancient lights from plaintiff's rooms, disabling one of his clothes lines, depositing apples into his yard while the apples deposited in the Greens yard are left to rot amongst never removed dog feces from 3 dogs one of which is a pit bull which was

running at large at (x) 1:15 p. m., on June 13, 2001 (investigated by Town of Union on June 17, 2001) and was otherwise seen dragging along one of Shaun Green's various skinhead housemates who hangs onto it's collar or ties a piece of rope thereto. Shaun Green has a floodlight mounted onto the back of the Green's house which in the Fall, and when leaves have fallen from said spite trees, shines into other peoples' homes and property including plaintiff's. Shaun Green also maintains various piles of rodent harborage upon the Green's backyard property line consisting of remnants of collapsed storage sheds, cinder blocks and the like. Additionally, Shaun has a perpetual collection of garbage in open containers stacked up against his house, in the in the area in controversy (see par. 9, *supra)* augmented by a metal storm door he intentionally leaves a jar for the wind to bang against his house. The garbage has collected for several months, attracting flies and occasionally skunks. Shaun Green sometimes deposits some of his garbage on the curb for pick-up but always maintains enough of it to deprive plaintiff of opening the windows on the South-side of his rooms. Shaun's garbage collection is also augmented by gas cans and open containers of used oil, which is also smeared over their driveway (ibid.) from Shaun Green having used the area to noisily work on thus far two automobiles.

48. **D** Although all of the aforesaid noisome events are zoning violations except for matters involving dogs which the Village insist be handled by the Town of Union, the Mayor adamantly refuses to have these violations prosecuted as prescribed by the zoning ordinance and his duties under NYS Village Law § 4-400.1 with prosecution further authorized by NYS

Village Law §20-2006 and §~ 1-15 —17 of the Code of the Village of Johnson City and has allowed an irregular procedure to develop. The normal process of submitting a written complaint to the CEO where he is then required to report to the Board of Trustees doesn't occur in practice. If the person is lucky enough to receive appealable paper from the CEO by mandamus or otherwise and an appeal is necessary, rather than allowing the person to merely file his appeal with the zoning board clerk the person is led into a Labyrinthian machination resolving at the Street Dept. barn with a person purporting to be an officer of the planning board who acts as a censor/intimidator/pseudo presentment agency with further screening by the Village attorney as clandestine counsel. In plaintiff's case Mayor Lewis has sworn under oath that JSC Rose has determined that none of the aforesaid *prima facie* zoning violations (par. 47) are zoning violations, when in fact, the aforesaid issues were never decided. And thus by Village action of non-action plaintiff is back to par. 45, *supra.*

49. **D** All of the foregoing indicates that the policy of the Village *(inter alia* pars. 19-22 *supra)* effectuates the deprivation of plaintiff's property without due process of law by persons acting under color of the law of NYS for which he is entitled just compensation; that his attempts to seek protection of these rights secured under the U.S. Constitution have led to him being preliminarily enjoined without hearing from seeking protection of his rights in regard to a number of prospective defendants; and since a municipality has no right to violate the Constitution then such policy ought to be declared unconstitutional,

permanently enjoined, the preliminary injunction declared unconstitutional and enjoined with $100,000.00 damages awarded to plaintiff in this action.

50. **A** Plaintiff demands trial by jury

Wherefore plaintiff Thomas Lamont Dyno demands permanent injunction against said policy of the Village and for damages of $300,000.00 together with the costs and disbursements of this action and for such other and further order and relief as may be proper.

I declare under penalty of perjury that the foregoing is true and correct.

Dated June 21, 2001

S/ Thomas Lamont Dyno

Thomas Lamont Dyno
Attorney in Person
46 Academy Street
Johnson City, New York
13790-1519
Phone: (607) 729-0839

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO,
Plaintiff
vs.

ANSWER
Civil Case No.
3: 01-CV-0321

THE VILLAGE OF JOHNSON CITY, HARRY G. LEWIS, MAYOR and DANIEL W. GREEN, III and MARY LOU GREEN
adjacent property owners
Defendants.

NAM/GLS

The Defendants, Village of Johnson City and Mayor Harry C. Lewis, by and through their attorneys, Coughlin & Gerhart, LLP., in response to the complaint herein state as follows:

1. Defendants lack knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "1", "2", "6", "7", "14", "18", "19", "28", "29", "47" and as those paragraphs are repeated and re-alleged in paragraphs "27" and "34"

2. Defendants deny the allegations contained in paragraphs numbered "3", "10", "12", "15" ~ "17", "20", "21", "22", "23", "24", "25","26", "30", "31", "32", "33", "36", "39", "40", "41", "42", "45", "46", "48", "49" and as those paragraphs are repeated and re-alleged in paragraphs "27" and "34."

3. Defendants admit the allegations contained in paragraphs "4 " and "5" of the complaint

4. With regard to paragraph "5" of the complaint, Defendants admit that the subject properties are located in a R(6) zoning district and further state

that Section 274-33.a of the Village of Johnson City Code speaks for itself. Defendants deny that all permitted uses of properties located in an R(6) zone are specifically set forth in Section 274-33.a of the Village Code.

5. With regard to paragraph "9" of the complaint, Defendants lack knowledge or information sufficient to form a belief as to the allegations contained in such paragraph but specifically deny the allegations set forth in 9(B).

6. With regard to paragraph "11" of the complaint, Defendants admit that Mayor Lewis had conversations with Plaintiff regarding the Greens' use of their property but deny the characterization of said discussions as set forth in such paragraph.

7. With regard to paragraph "13" of the complaint, Defendants admit that the Village Code Enforcement Officer determined that the Greens' use of the property was not in violation of Village Code but deny that said determination was contrary to the express language of the Village Zoning Ordinance.

8. With regard to paragraph "14" of the complaint, Defendants lack information sufficient to form a belief as to the "gravaman" of Plaintiffs Zoning Board appeal from the Village Code Enforcement Officer's determination, but deny that the Greens' use of their property was in violation of the Zoning Code and also specifically deny all allegations contained in paragraph "14(B)" of the complaint.

9. With regard to paragraph "16" of the complaint, Defendants lack knowledge or information sufficient to form a belief as to the motivation for

the Plaintiff's motivation for filing a CPLR Section 78 petition but admit that on February 3, 1997 JSC Robert S. Rose entered an order and decision in Plaintiffs CPLR Article 78 proceeding.

10. [sic - incorrectly numbered, there is no ¶10]

11. With regard to paragraph 35 of the complaint defendants state that the Appellate Division, Third Department's Decision and Order speaks for itself. Defendants otherwise deny the allegations of paragraph 35 of the complaint.

12. With regard to paragraph "37" of the complaint, Defendants state that the complaint referred to therein speaks for itself but specifically deny the allegations contained in paragraph "37(A)" of the complaint.

13. With regard to paragraph "38" of the complaint, Defendants state that Judge Rose's decision and order of September 23, 1998 speaks for itself and denies Plaintiffs characterization of said decision.

14. With regard to paragraph "43" of the complaint, Defendants admit that the Village Attorney represented the United States of America acting through the Rural Housing Service in prosecuting a mortgage foreclosure action against Defendants Daniel W. Green, III and Mary Lou Green and also admit that the Rural Housing Service voluntarily discontinued the action after the Greens made restitution curing all mortgage arrears. Defendants deny each and every other allegation contained in paragraph "43" of the complaint.

15. With regard to paragraph "44" of the complaint, Defendants admit that Plaintiff initiated an action

against Binghamton City Court Judge John T. Hillis and that Village Attorney Todd D. Kilpatrick represented William L. Gibson, Jr. in said litigation. Defendants deny each and every other allegation contained in paragraph "44" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

16. Plaintiffs claims are barred by the applicable statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

17. The complaint fails to state a cause of action as against the Village of Johnson City.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

18. The complaint fails to state a cause of action as against Mayor Harry G. Lewis.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

19. Plaintiffs claims are barred by the doctrines of res judicata and collateral estoppel.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

20. Plaintiff is barred by a preliminary injunction entered in Broome County Supreme Court from initiating any additional litigation based on the facts set forth in the complaint and as such the instant action is in direct violation of a viable state court order.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

21. Defendants Village of Johnson City and Mayor Harry G. Lewis are entitled to good faith immunity from liability in this action as they acted at all times in good faith, with clear legal authority and

justification and without malice.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

22. Defendant Harry G. Lewis is entitled to qualified and legislative immunity from liability he was, at all times relevant to this action, acting in his official capacity as Mayor of defendant Village of Johnson City, and all of his actions were undertaken in good faith reliance on valid New York State Supreme Court decisional law, and upon the advise of counsel.

AS A FOR AN EIGHTH AFFIRMATIVE DEFENSE

23. Plaintiff has enjoyed a full and fair opportunity to pursue all claims set forth in the instant complaint before both a local administrative body as well as before the state courts of the State of New York. As such he has been afforded substantial due process.

WHEREFORE, Defendants demand judgment against the Plaintiff dismissing the complaint herein, granting to the Plaintiff the costs and disbursements of this action and such other and further relief as the court deems just and proper.

Dated: July 13, 2001

S/ Todd D. Kilpatrick

Todd D. Kilpatrick, Esq. of counsel Bar II No. 301497
Coughlin & Gerhart LLP Attorneys for Defendants
Village of Johnson City and Harry G. Lewis, Mayor
20 Hawley Street; P.O. Box 2039
Binghamton, NY 13902-2039(607) 723-9511

TO: Thomas Lamont Dyno, pro se
46 Academy Street Johnson City, NY 13790

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO,
Plaintiff,

vs.

THE VILLAGE OF JOHNSON CITY, HARRY G. LEWIS, MAYOR and DANIEL W. GREEN, III, and MARY LOU GREEN adjacent property owners
Defendants.

NOTICE OF MOTION

Civil Case No.: 3-01-C V-0321 (NAM)(GLS)

PLEASE TAKE NOTICE THAT, upon the annexed Affidavit of Todd D. Kilpatrick, Esq., sworn to on December 20, 2001, and on the pleadings, Defendants will move this court, at a motion term thereof to be held February 6, 2002, at the Federal Building in U.S. Courthouse, Syracuse, New York at 10:00 a.m., or soon thereafter as counsel may be heard, for an Order dismissing the Complaint pursuant to FRCP 12(b)(6) on the following grounds:

1. The judgment heretofore entered in cases entitled In the Matter of the Application of Julia Dyno. Thomas Dyno. and Carol Cass v. The Village of Johnson City, Village of Johnson City Zoning Board of Appeals, Daniel W. Green, III. and Mary Lou Green, Index Number 96-2033 and Julia Dyno. Thomas Lamont Dyno, and Carol Cass v. Harry J. Lewis-Mayor, and the Village of Johnson City, Index Number *98-1345,* both actions having been brought in the Broome County, New York, Supreme Court, are res judicata as to the issues and claims alleged by Plaintiff in this action and Plaintiff, is, therefore. barred and estopped to assert the claims made in this matter.

2. Plaintiff's complaint failed to state a cause of action pursuant to FRCP 12(b)(1) and 12(b)(6).

3. Plaintiffs Complaint is barred by the applicable statute of limitations, N.Y.CPLR §214, (3 years).

4. Additionally, Defendants hereby move this Court for an Order pursuant to 28 USC § 1651 for an Order prohibiting Plaintiff from filing future complaints in this court without first obtaining leave of the court to do so.

PLEASE TAKE FURTHER NOTICE, that defendant also demands an Order awarding it costs, disbursements and reasonable attorney fees.

PLEASE TAKE FURTHER NOTICE, that pursuant to Rule 7.1(b)(2) of this Court's Local Rules that responding papers, if any, shall be served upon the undersigned not less than fourteen (14) calendar days prior to the return date of the motion.

Dated:
December 20, 2001.
Binghamton, New York

S/ Todd D. Kilpatrick
Coughlin & Gerhart, LLP
Todd D. Kilpatrick,
of counsel
Bar Roll No. 301497
Attorneys for Defendants
Village of Johnson City
And Harry G. Lewis, Mayor
20 Hawley Street
P.0. Box 2039
Binghamton, NY
13902-2039
(607) 7230911

TO: Thomas Lamont Dyno, pro se
46 Academy Street Johnson City, NY 13790

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO, *Plaintiff,* vs. THE VILLAGE OF JOHNSON CITY, HARRY G. LEWIS, MAYOR and DANIEL W. GREEN, III, and MARY LOU GREEN adjacent property owners *Defendants.*	AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS Civil Case No.: 3-01-C V-0321 (NAM)(GLS)

STATE OF NEW YORK)
COUNTY OF BROOME) SS.

Todd D. Kilpatrick, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice law within the State of New York and before the United District Court for the Northern District of New York. I am a partner in the law firm of Coughlin & Gerhart, LLP, attorneys for the Defendants in this matter and offer this affidavit in support of defendants' motion to dismiss the complaint pursuant to FRCP 12(b)(6), 12(c) as well in support of Defendants' motion pursuant to 28 USC § 1651 seeking an order of this court prohibiting the Plaintiff from filing additional actions based on the same or similar facts without first obtaining leave of this court to do so.

2. In making the instant motion the Defendants seek dismissal of the complaint based principally on the ground that the claims are barred by the doctrine of res judicata/collateral estoppel.

3. The Defendants allege that even if the court finds that the Plaintiff has set forth claims that have not previously been adjudicated, that the action must still be dismissed because Plaintiffs complaint fails to set forth a cause of action upon which relief can be granted. The circumstances underlying the pro se Plaintiff's current suit date back to the summer of 1996 when Plaintiff, on behalf of himself, his wife, and his mother filed a CPLR Article 78 proceeding ("Action I") in the Broome County Supreme Court seeking review of a decision of the Village of Johnson Citys Zoning Board of Appeals which found that a basketball backstop erected by the adjoining property owners (the Greens) did not violate local zoning ordinances. Plaintiff attempted to amend his original petition immediately before the return date to add additional claims against the Village. This matter was assigned Broome County Index No. *96-2033* and the petition was heard before the Honorable Robert S. Rose on December 20, 1996. (Copies of the original petition and amended petition are attached hereto as Exhibit A"). Judge Rose dismissed the petition in a decision and order entered on February 3, 1997. A copy of that decision is attached hereto as Exhibit "B".

4. A reading of Judge Roses decision is instructive in terms of the allegations set forth in the petition. In that action, just as here, the Plaintiff contended that it was the Village's responsibility to enforce the Village Zoning Ordinances in order to control his neighbor's incidental use of their property. (use of the basketball hoop and backboard). The Village successfully defended the claim arguing that the basketball backstop was a permissible incidental and customary use of residential property in an R-6 zone.

After filing the original petition, the Plaintiff attempted to amend the petition to add extraneous material and additional allegations immediately prior to the return date. As the decision illustrates, Judge Rose denied such amendment pursuant to CPLR 3025(b) and CPLR 7804(d). The matters set forth in the amendment included a claim that the Village violated his civil rights by refusing to accept and file his criminal complaints against the Greens. (See Exhibit 'A") Judge rose specifically addressed the merits of those claims and found them lacking legal merit.

5. The petition also contained claims that the Village failed to respond to his complaints by restricting Green's use of their property or prosecuting them for violating the zoning ordinances. Judge Rose's decision clearly sets forth that the Plaintiff failed to allege or show that the Village was legally required to act on his complaint in that municipal officials have wide discretion as to whether to investigate and prosecute alleged violations such that the special remedy of mandamus does not lie to compel performance of a discretionary act. Judge Rose at that time also advised the Plaintiff that he had a private remedy against the Greens for trespass, nuisance, or other civil remedies.

6. The Plaintiff then appealed the February 3, 1997 decision to the Appellate Division, Third Department. The Appellate Division unanimously affirmed the trial court's findings in all respects by written decision and order dated May 20, 1999 (a copy of the Appellate Division's Decision affirming Judge Rose's 2/3/97 decision is attached hereto as Exhibit C.

7. Plaintiff then appealed the Appellate Division's decision to the New York State Court of Appeals, initially asserting that he had an appeal as a right, and later requesting leave to appeal. The Court of Appeals dismissed his attempted appeal as of right (93 N.Y. 2d 1033) and thereafter denied his request for leave to appeal (94 N.Y. 2d 818). (Copies attached as Exhibit 'D")

8. Thereafter, on June 10, 1998, the Plaintiff initiated a new action in the Broome County Supreme Court, (Index Number 98-1345) seeking essentially the same relief requested in the Article 78 proceeding and based upon substantially the same occurrences and claims as set forth in the previous proceedings ('Action II"). Plaintiffs complaint in that action indicated that he was seeking to obtain judgment directing the Village to accept his criminal complaints against his neighbors (the Greens) as well as directing the Village to enforce its zoning code by compelling the removal of the basketball backstop. Plaintiff also sought a declaration that the Village's continuing policy depriving him of the right to file accusatory instruments alleging criminal acts and zoning violations constituted a taking of his property without due process of law in violation of the United States Constitution. Additionally, the Plaintiff sought monetary damages for intentional infliction of emotional distress as well as injunctive relief enjoining the Village from refusing to accept additional criminal complaints.

9. The Village moved for summary judgment on July 24, 1998 as well as for a preliminary injunction and restraining order in a companion case enjoining the Plaintiff from initiating additional actions based on

the same or similar facts without first retaining counsel or obtaining leave of court.

10. After hearing oral argument, Judge Rose granted the Village's motion for summary judgment based essentially on res judicata/collateral estoppel grounds as well as on the grounds that the complaint failed to state a claim upon which relief could be granted. (A copy of Judge Rose's 9/23/98 decision and order is attached hereto as Exhibit E"). A reading of Judge Rose's decision illustrates that Action II was simply a continuing attempt to litigate matters previously dismissed in the original Article 78 proceeding.

11. Plaintiff then filed a notice of appeal to the Appellate Division, Third Department. Seeking review of Judge Rose's 9/23/98 decision, Plaintiffs appeal was dismissed for failure to perfect the same within the nine-month period required by the NYCRR. The Appellate Division provided Plaintiff with an extension to perfect the appeal but he failed to do so within the time limits specified in the extension order. Plaintiff then filed a motion for an additional extension of time in which to perfect the appeal. That motion was denied by decision and order of the Third Department dated 10/18/99. (A copy of the Third Department's decision and order is attached hereto as Exhibit F".)

12. Plaintiffs notice of appeal as of right to the Court of Appeals was denied by order dated 1/6/00. (A copy of which is attached hereto as Exhibit G"). Plaintiff thereafter moved for leave to appeal. Leave was denied by the Court of Appeals in a decision dated April 4, 2000. (A copy of said order is attached hereto as "Exhibit H").

13. In February of 2000 the Plaintiff filed a motion (by order to show cause) in Action II pursuant to CPLR §50 15 seeking vacatur of the court's decision in that action which granted the Village's motion for summary judgment as well as its granting of a preliminary injunction prohibiting Plaintiff from filing additional suits without permission of the court. (A copy is attached hereto as Exhibit I")

14. The matter was heard by the Honorable Joseph Hester who issued a decision denying the motion dated June 26, 2001. (A copy of Judge Hester's decision is attached hereto as Exhibit "J"). Once again, the Plaintiff filed a notice of appeal dated June 26, 2001.

15. Although the court in Plaintiffs Action II did not necessarily treat his claims as such, the complaint referenced § 1983 and Plaintiff's comments in various notices of appeal and other extraneous pleadings clearly indicated that he believed that he set forth a § 1983 claim in that action. The Plaintiff claimed in that action that the Village deprived him of his civil rights under color of state law by refusing to enjoin the Greens from using the basketball backstop as well as refusing to accept his criminal complaints and thereafter acting on those complaints and prosecuting the Greens for various code violations. The issues involved in both actions I and II are virtually identical to those pursued by the Plaintiff herein.

16. In the instant action, Plaintiff sets forth three familiar claims. (A copy of the complaint is attached hereto as Exhibit "K") In the first cause of action, the Plaintiff once again attempts to attack the Broome County Supreme Court's finding in the original Article 78 proceeding that the Greens' use of their

property to erect a basketball backstop and thereafter use that backboard for its intended purpose was in violation of the local zoning ordinance and that the Village had the constitutional responsibility to enjoin such use. Plaintiff points to an occurrence on March 6, 1998, approximately one month following Judge Rose's dismissal of Action I, when the Greens once again started to use their basketball hoop. At that time, the Plaintiff allegedly complained to both the Village Police Department and Defendant Mayor Lewis about this activity. In response, Plaintiff was informed that the Supreme Court had already decided the merits of his complaint in this regard and confirmed the Zoning Board of Appeals decision that the erection of the basketball hoop was a proper incidental use of their residential property. As such, the Village was not in a position to deny the Greens the proper use of their property.

17. In its February 3, 1997 decision, the Broome County Supreme Court noted that the Plaintiff filed a complaint with the Village Code Enforcement Officer who investigated the placement of the subject basketball pole, backboard and hoop. The Code Enforcement Officer found the backstop as erected was not in violation of Village Zoning Code. The Plaintiff thereafter appealed to the Village Zoning Board of Appeals who found that (1) the code's setback rule applied to building and not structures, and the backstop was a structure and not a building; (2) even if the backstop were considered to be a building, its setback would not be inconsistent with the average setback of buildings within the immediately vicinity of the property; and (3) that the petitioner's complaint related more to the nature of

the activity involved than the use of the backstop which was not deemed a zoning issue, rather than its placement. (February 23, 1998 decision at page 16). In both prior actions the Plaintiff criticized the ZBA's decision and the Village's failure to take corrective action on the grounds that the backstop was not a permitted use in the R6 district, that the Greens obtained neither a use variance of a building permit for the backstop, and that its (backstop) placement violated the five-foot set back requirement of the code. In rejecting the Plaintiff's contentions, the court found that the ZBA's decision was supported by substantial evidence and the court was not in a position to substitute its judgment for that of (the ZBA) so long as "its determination is rational and not arbitrary and capricious". (J.S.C Rose, 2/3/97 at page 1 7).

18. As stated previously, shortly before the return date of the subject Article 78 petition in Action I, the Plaintiff attempted to amend the petition to add additional matters specifically alleging that the Village failed to respond to his complaints by restraining or prosecuting the Greens for their alleged trespasses, nuisance and other obnoxious conduct on or adjacent to his property. Judge Rose in his decision specifically determined this issue stating:

'Petitioners have neither alleged nor shown that respondent had been legally required to act upon their complaints and to prosecute respondents Green. In this regard, it is well recognized that a municipality and its enforcement officers have discretion as to whether to investigate and prosecute an alleged violation and that an Article 78 proceeding in the nature of mandamus does not lie to compel performance of a discretionary duty." In the Matter of

Young vs. Town of Huntington, 121 A. 2d 641, 642; Matter of Hamptons Hospital and Medical Center v. Moore, 52 NY 2d 88."

19. In this action the Plaintiff incredibly alleges that the Village and specifically Mayor Lewis violated his constitutional rights when in reliance on the Supreme Court's decision confirming that the backboard was a permitted use he declined to enjoin further use of the backboard or prosecute the Greens' for code violations. This allegation is absurd. The issue of whether the basketball backboard violated the zoning ordinance and whether the Village had a responsibility to investigate and prosecute the Plaintiffs complaints about such use had already been finally determined in a court of law. The Supreme Court's decision was thereafter affirmed by a unanimous appellate division and the Plaintiff's leave to appeal that decision was dismissed by the Court of Appeals. Those two issues have been finally determined and the Plaintiff had a full and fair opportunity to pursue his claims. As such, the claims set forth in the Plaintiffs first cause of action herein are barred by the doctrines of res judicata/collateral estoppel. Further, Plaintiffs absurd claim that the Village should not have relied on a valid decision of the Broome County Supreme Court should be dismissed as a matter of law for failure to state a claim upon which relief can be granted.

20. The Plaintiffs second cause of action is equally lacking in merit. Essentially, the Plaintiff argues that the Village's opposition to his order to show cause seeking a temporary restraining order restricting the Greens' use of their land until his appeal of Judge Rose's February 3, 1997 decision had been heard indicated an "interdependence" with the Greens and

violated his 13th Amendment Right to be free from "involuntary servitude" as well as his 14th Amendment right to be free from interference with the use of his property without due process of law. This allegation is utterly lacking a legal basis and must be dismissed.

21. In essence, Plaintiff contends that the Village violated his constitutional rights under color of state law by entering its opposition to the Plaintiffs requested relief in an action to which it was a defendant. In order for the Plaintiff to have succeeded on his request for a temporary restraining order and preliminary injunction he had to set forth proof of the likelihood of his success on the merits of his appeal. Obviously, the Village did not believe that the Plaintiff had any reasonable opportunity for success on appeal and was required to state its position. The Village did not believe that it should be compelled to enjoin the activity of a citizen previously determined to be permissible. The Village did not at that time or at any other time have any conversations or interactions with the Greens with regard to the Plaintiffs continuing crusade against the Village and his former neighbors. The truth be known, the Greens no longer live in the subject property and the property was set for public sale in a mortgage foreclosure action on November 19, 2001. As a result of such public sale, the Greens are no longer the owners of the subject property and all the issues regarding their use of the property are moot.

22. Additionally, as part of his second cause of action the Plaintiff alleges in paragraph 32 of his complaint that 'said imposition deprived Plaintiff a fair opportunity to perfect his appeal and render him a

Village prisoner in his own home." Plaintiff pursued a similar claim in his CPLR 5015 motion in Action II wherein he blamed his failure to perfect his appeal in Action II on the Village's counsel refusal to stipulate to his proposed record on appeal because it contained extraneous information not before the court. Judge Hester aptly noted in his decision at Page 4 that "Plaintiff's attempt to blame Defendants' counsel for their failure to timely perfect their appeal claiming that he refused to stipulate to the correctness of the record is incredible. Any disputes concerning the contents of the record on appeal could have been resolved by a motion to settle the record, a procedure with which Plaintiffs are familiar (see Matter of Dyno v. Village of Johnson City, *255* A.D. 2d 737; see also Exhibit "J". The Plaintiff in paragraph 31 contends that the Village's decision to oppose his order to show cause amounted to a "policy" which deprived him of his rightful use of his property. There is no factual or legal basis for this assertion and it clearly fails to set forth a claim upon which relief can be granted. The Plaintiffs continued assertion in paragraph 33 of the complaint that the Village's decision to oppose his motion for a stay not only deprived him of the use of his property but of his ability to practice the Cecchetti Method of Classical Theatrical Dance, six hours a day, six days a week as is required by his career choice" is once again utterly absurd.

23. The Plaintiff's third cause of action is essentially indecipherable. It would appear in part that Plaintiff contends that the Village somehow violated his unspecified constitutional rights by obtaining a preliminary injunction in the Broome County Supreme Court restraining him from further legal

actions based on the same or similar occurrences. Judge Rose granted the Village's request for a preliminary injunction in his 9/23/98 decision (attached hereto as Exhibit E"). In that same decision, Judge Rose granted the villages summary judgment motion dismissing the Plaintiffs previously described complaint in Action II based on res judicata and municipal immunity grounds. The Plaintiff had an opportunity to obtain relief from Judge Roses' decision by appeal, but failed to timely perfect his appeal resulting in a dismissal and waiver of such right. The Plaintiff thereafter attempted to once again attack Judge Rose's issuance of the preliminary injunction in his CPLR 5015 Motion before Judge Hester. Judge Hester in his June 26, 2001 decision denying such motion specially addressed the issue as follows:

"Plaintiff also claims that the order authorizing the preliminary injunction in Action II was made in denial of his due process rights because the court granted Defendants' motion enjoining him from "practicing law" prior to hearing his motion to dismiss the complaint which was returnable approximately two weeks later. Again, if Plaintiffs were unhappy with the results, their remedy was to take and perfect an appeal. In any event, in order to grant a preliminary injunction, Supreme Court necessarily found that Defendants demonstrated a likelihood of success on the merits and, as such, there was no basis to dismiss the complaint."

24. Plaintiff's third cause of action is yet again another attempt to seek judicial review of Judge Rose's decision granting that the Village's request for a preliminary injunction. Plaintiff had a full and fair opportunity to litigate this matter in Action II.

Having failed to perfect his appeal, he now attempts to find another avenue to attack the decision. This claim is clearly barred by res judicata/collateral estoppel. The remainder of the Plaintiff's third cause of action appears to be stream of consciousness wherein Plaintiff attempts to elicit various grievances with the Village and its counsel without stating a claim.

25. Paragraphs 40-46 of the complaint set forth a disjointed barrage of assertions with no apparent connection to one another and no apparent connection to any alleged violation of law, rule, regulation or constitutional provision.

26. Paragraph 47 of the complaint once again re-asserts various grievances against the Greens' use of their property, including the alleged accumulation of trash, dog feces, use of flood lights and other alleged malfeasance claimed to be zoning violations. Plaintiff contends that the Village has deprived him of the use of his property in violation of his constitutional rights by failing to prosecute the Greens for said alleged zoning violations. As stated previously, Judge Rose addressed the issue of the municipality's responsibility to investigate alleged code violations in his February 3, 1997 order and decision described above. The decision was unanimously affirmed by the Appellate Division, Third Department. As such, any alleged claim based on the Village's failure to investigate code violation complaints and prosecute the alleged violators is barred by the doctrines of res judicata and collateral estoppel.

27. As described above as well as in the various decisions of the New York State Courts, Plaintiffs

continued relentless pursuit of claims previously decided represents an abuse of the judicial system and a waste of valuable municipal resources. The Plaintiff has had more than a full and fair opportunity to litigate all of his grievances against the Village as well as his neighbors. Plaintiff has been informed on numerous occasions that his grievance is not with the Village but with his neighbors and that his remedy was to pursue a civil cause of action against them for trespass and nuisance. Plaintiff apparently harbors the attitude that he understands the law far better than the judiciary of this state. Under the circumstances, the Plaintiff must be enjoined from further abuse of this system and harassment of the municipal Defendants. As such, an Order enjoining Plaintiff from bringing any further actions based on the theories pursued in this case as well as the facts alleged is appropriate and necessary. Additionally, consideration of monetary sanctions in the form of the imposition of costs and payment of the Village's reasonable attorney's fees expended in defending this claim should be considered as an additional deterrent to further abusive conduct.

WHEREFORE, I respectfully request that an order be granted dismissing the complaint, together with an order pursuant to 28 USC 1651 enjoining the Plaintiff from pursuing addition actions without leave of court as well as such other and further relief as the court deems proper including the Defendants' reasonable attorney's fees expended in defending this claim as well as its costs on this motion.

Dated: December 20. 2001
Binghamton, New York

S/ Todd D. Kilpatrick

Todd D. Kilpatrick

Sworn and subscribed to before
me this 20th day of December, 2001.

S/ Mary Beth Carboni

MARY BETH CARBONI
Notary Pubic, State of New York
No. 01CA5040785
Qualified in Broome County
Commission Expires 3-20- 2003

JOHNSON CITY CODE ENFORCEMENT
COMPLAINT

DATE: 4/29/96
TIME: 8:30 am

COMPLAINANT: Thomas Dyno
COMPLAINANT'S ADDRESS: 46 Academy Street

PROPERTY IN VIOLATION: 42 Academy Street

OWNER OF PROPERTY: Daniel Green
ADDRESS: 42 Academy Street

COMPLAINT: Basketball court is too close to line of 46 Academy Street causing damage to house Contrary to general zoning ordinance Purpose & Intent. Thomas Dyno, Carol Cass and Julia Dyno visited my office with a righten [sic] about property

Submitted with complaint "Code Solution (II)" & Nusance, Zoning & a Touch of Negligence.

S/ William Dekar
Enforcement officer, name and title

May 10, 1996 Memo by CEO Dekar

5/10/96

Mayor Lewis ask me to
check dimension of backboard
at 42 Academy Street

5/13/96 Measured backboard
6' 1" from base of wall
to edge of pole

Pole is 4" in diameter

Backboard extends 24" from
Center of Pole to Edge

Mayor Lewis and attorney Gibson
Requested Code Dept. to
Issue a order to remedy
to correct section 274-34
pertaining to 5' minimum side
yard requirement

Sent order by Reg and Registered Mail
5/13/96

WILLIAM L. GIBSON, JR.
VILLAGE ATTORNEY
VILLAGE 0F JOHNSON CITY
257 Main Street
Johnson City, New York 13790
(607) 770-0894
FAX (607) 770 1978

May 20, 1996

Mr. Thomas Dyno
Ms. Carole Cass
46 Academy Street
Johnson City, New York 13790

Dear Mr. Dyno and Ms. Case:

After Ms. Case' appearance at the Board of Trustees Meeting held May 7, 1996, I had occasion to research your complaints and this letter is in response.

It is my understanding *that* your complaint is based on the presence of a basketball backstop located on property abutting yours at 42 Academy Street, which property is owned by people named Green. Apparently, a child of the Greens and his friends are playing basketball in the Green driveway and throwing the basketball against the basketball backstop located on the edge of the Green driveway. In addition, it is my understanding, there is some issue with whether the children have caused the ball to bounce against your home causing damage.

After researching the Village ordinances and based on the investigation by our Code Enforcement Officer, it appears that the pole supporting the basketball backstop and the backstop itself are legally erected on the Green property. Our Zoning Code provides in Section 274-34 that a minimum side yard is five feet.

The definition set forth in Section 274-4 defines a side yard as "a yard between the principal building or accessory building arid a side lot line and extending through the front yard to the rear yard." A building is defined in the definitions as "any structure having a roof supported by columns or by walls and intended for the shelter, housing or enclosure of persons, animals or property." Obviously, a basketball backstop does not meet the definition of a building and is, therefore, exempt from the five-foot requirements of the side yard setback.

The Village Code provides for the peace and good order within the Village and Section 192-5 specifically makes it an offense against such peace and order by any person who, with intent to provoke a breach of the peace, commits any one of several enumerated acts. One of the enumerated acts is that "the person acts in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others. Section 192-5 of the Village Code is generally consistent with the New York State Penal Law although it is more restrictive. The Penal Law is specifically limited to actions that take place on the public right-of-way. And Section 192-5 mirrors the Penal Law in this regard.

In order to be guilty of disorderly conduct, a person must breach the peace. A breach of the peace is a disturbance of public order by an act of violence or by an act likely to produce violence or which, by causing consternation and alarm, disturbs the peace and quiet of the community. People v. Perry, 265 NY 362.

Based on my conversations with Ms. Case at the Board Meeting and the information contained in Mayor Lewis' file, it appears that the actions of the

young people that are playing basketball in the Green driveway do not constitute disorderly conduct in any way. There is no "breach of the peace" as defined in law and there is no disturbance on a public right-of-way (although it is not clear that under the Village Ordinances that, disorderly conduct is confined to the public right-of-way) Private annoyances, however exasperating or reprehensible, are insufficient to constitute disorderly conduct, where no breach of the peace has resulted or is eminent. People v. Balnis. 14 Misc. 2d 928.

It appears that 'the noise of the basketball being dribbled on the pavement and the noise of the basketball coming in contact with the backstop are private annoyances and not actionable either under the Penal Law or our Village Code. Obviously, if these noises were to occur late at night, I believe a different argument could be made. But, however, given the facts as I understand them, this is not the case.

As to the allegations that the children are throwing the basketball against your house damaging your siding, you have several remedies. You could bring a formal complaint under the Penal Law, commence a civil action against the children alleging trespass, or request that the Village prosecute under Section 192-8 of the Village Code providing that no person shall willfully damage any building, structure or other property of a person. Again, based on the facts as I understand them, it appears that there is no willful damage.

As I believe other attorneys may have mentioned, you may possibly have grounds for bringing a civil suit against the Greens alleging a nuisance. You would, of

course, have to allege that the Greens were doing something that, materially interfered with your use and enjoyment of your property and was unreasonable in itself, Obviously, this is a matter between two property owners and does not involve the Village.

I have asked Police Chief Hannon to consult with the District Attorney's Office to determine if they take a different view of disorderly conduct and, if so, whether they would prosecute were a criminal complaint to be filed.

Living in an urban area has its pluses and minuses. Living in the Village gives us the security of having police and fire protection and ready access to an ambulance if we need it. On the other hand, having neighbors in close proximity results in the types of annoyances that you have described. These are the tradeoffs that we make when we choose to live in the Village. We can, of course, move to the country and have a much higher level of peace and quiet but on the other hand, we lose some of the protections that the urban setting provides.

Very truly yours,
(unsigned)
William L. Gibson, Jr.

WLG/gs
CC: Mayor Lewis

Answers to Question of Lee Hartjen -- Counsel
June 10, 1996 Village of Johnson City New
Zoning Board of Appeals.
Submitted for the Record, June 17, 1996.
Thomas Lamont Dyno
46 Academy Street
Village of Johnson City, New York
729-0839

The "SPECIFICALLY ALLOWED IN THE DISTRICT" Clause: Johnson City Village Code, 274-4.B "Definitions": "permitted use" [see under "u" for "use"].

(I) In pursuance of 274-4.L, "Definitions": (1) Private Outdoor Recreation; and (2) permitted use"

(1) Basketball isn't, "specifically", "Private Outdoor Recreation";

(2) Basketball isn't, "specifically allowed in the district" (R6];

(3) By 274—4.B. definition of "permitted use", Basketball, is not, a "permitted use" on Private Residential premises; and, therefore

(4) In order to "erect" the permanent "structure" facilitating the playing of, any, "private outdoor recreation" not "specifically allowed in the district", requires a, "use variance".

This is what the People, democratically, decided, they want; as well as it being, "necessary and proper", for the purposes of satisfying' "equal protection of the law" "due process rights", of those *adversely* effected.

(II) In pursuance of NYS Village Law, Art. 7-712(2)(c)[now Art. 7-712-a.4], per 1976 Opinions of the Attorney General April 28 (informal)" - to wit -

"The Board of Appeals . . . has the sole authority to grant a variance".

There is no proviso, in NYS, which allows such power to be furtherly delegated; and properly; As no state had ever vested such Power in one individual, excepting the Pope

Allowing such "use", in question, to stand and continue, is (a) an unauthorized delegation of authority, sustaining, (b) a pseudo - benefit of Green, by the unauthorized, unlawful and illegal "grant" of Code Enforcement Officer Dekar: thereby, unlawfully allowing (C) an unlawful, unauthorized and therefore, false, variance; taken altogether, facilitating and compounding my injurious damages, individually, and an injury to the Public, at large.

III) Zoning Policy, as enacted by the State Legislature, and adopted as Local Law, expressly proscribes, nuisance - as is evidenced by the language of nuisance, (e.g., inter alia) "comfort", "convenience" and "easements": as incorporated in State, as well as in this jurisdiction's Local Law.

As there are no economic factors or considerations, involved, hence, no purported, damnum absque injuria, present; it, veritably, doesn't matter if such structure is a windmill, Ferris wheel, goal posts, driving range, &c., &c. It is, either -

1) Illegal - and, therefore, in violation of 274-4.B. "permitted use", per the "illegality clause", thereof; or

2) "[Not] specifically allowed in the district", which is, therefore, in violation of a "permitted use"; or

3) Tending to the damages of my Real Property, leading to my "[discomfort" "[in]conven[ience]" and

deprivation of natural "easements" such as air): then such "use" is contrary to Legislative Policy; and cannot be made, otherwise, lest it be removed (as shown, below)

(IV) The so-called 5' set-back rule, is irrelevant, as is a permit —as has already been sufficiently shown by explanation, citations and quotations of pertinent precedents

Although Green ought to have, at least, applied for a permit, which according to Bill Dekar (Code enforcement Officer) he did not; nor did he even ask: a permit cannot supplant a variance; and only the Zoning Board of Appeals may grant a variance. The Code Enforcement Officer, nor the Police Chief, nor the Village Attorney, Mayor, &c. may grant a variance; only the zoning board has such power, and such power cannot be delegated. To Allow Any Other "Interpretation" or "Decision" to stand:

(1) Not only transcends the Policy of the NYS Legislature, but also, traverses and deprives me of my Rights of Habitation" (as already pleaded argued and appearing on the record).

(a) In addition to these foregoing and aforesaid Rights of mine being deprived: Due Process is Violated and Denied, by

(i) Allowing the Board to sustain a "(non permitted use" without a variance; (ii) granting a variance w/out a Public hearing; (iii) disallowing the aggrieved to show why such variance ought not be granted, while allowing the person to either have such variance w/out Public hearing: or the same, by the Code Enforcement Officer or the Board of Trustees — or, whom next? the Village Attorney? Clerk?, &c.,

granting one.

All of which, can be nothing less, than a conspired means to avoid the law, whilst subverting the Rights of others. Only to remark - when a Right is violated, one need show no more.

(2) And, it facilitates or enables, a false ethos — that something which is not a "permitted use", doesn't need a permit; but what sort of semantic artifice is this? Of course it doesn't need a permit, it needs a variance!
Quite obviously, Green hadn't asked our permission, 1st, having lashed the thing to OUR clothesline pole & then refusing to move it even after the Police asked him to. But Green ought to have at least, inquired, as to whether he'd need a permit or not, from the Village. This leads to another bifurcation —

(a) The fact that Green didn't inquire with the Village (see Exhibit VII for the circumstance of that time -- mid April '95) shows his malice, as motive for such act(s); or at least shows his "negligent disregard" for Our Rights of Habitation (see "People v Borden's Condensed Milk" 151 NYS 547 -- as quoted in Oral Presentation June 10, 1996 Zoning Board of Appeals J "his failure to think of anybody but himself".

(b) Or, perhaps, someone might have told Green that he didn't need a permit: in a scenario where one wrong leads to a chain reaction of one citizen telling the next, "Oh you don't need a permit for that", continuing in such manner that such structures proliferate and those materially annoyed, &c.., pretentiously deceived into falsely believing that they've no remedy, &c from the Village, which created such illegality! Altogether, few, If any, actually

knowing what a variance is, and by course, not knowing when a situation requires one, conniving in a chaotic state of lawlessness. All of which, In duty and obligation to the Public, has to be checked: both in terms of the General Welfare, as well as restoring my Rights of Habitation and ensuring their protection of the law, thereafter. If not, then no government of this Village any Longer exists.

In Conclusion, to the "SPECIFICALLY ALLOWED IN THE DISTRICT " clause.
When you grant a variance, you soften and bend the law in order to accommodate restrictions which, by course, would be allowed or disallowed, had the administrative "legislative" Board of Trustees, the power to foresee any or all situations that would ever arise. In Zoning parlance, such action devolved to the two preponderants of use restriction/variance, or area restriction/variance. Such Interpretive Power and softening of the law (as only regards property) lend to that area of jurisprudence, known, as equity (see "Declaration" June 10, 1996, as referenced, therein].

Some members of the Board demonstrate a strong and heavy disposition, regarding what they, purport to be, the Property Rights of Green: claiming or alluding that Green must be allowed to maintain a nuisance to my injurious damages, with no other rationality than, "because", or "because we say so", &c. Hardly an acceptable answer to Mandamus; so why would anyone believe it be acceptable to me? These members don't appear to take into account mine and my £amily's discomfort and pains, sufferings and depredations, far beyond the level of "annoyance"; nor do these appear to be concerned for those, potentially, regarding the vicinage. Every cause has an effect:

As for this so-called "set-back rule" (as such words appear, nowhere, in the code), it is inappropriate. The matter is not one regarding, area, the matter is one regarding, a "[non] permitted use"; and, therefore, a situation requiring a "use variance". But as already shown, Green can't have a "use variance" due to the location manifesting such "use" a nuisance. If Green applied and you granted, I'd defeat such grant by Art. 78 relief in the form of Mandamus, "review of discretionary powers" (which in this matter have been, far, exceeded); If Green applied and you refused, and Green could find someone to do an Art. 78, no Court would order such variance granted: citing, in both instances "Fiorini *v* Parkhurst" 198 Misc. 796 @ 798, quoting People *ex rel.* Wood v Assessors 137 NY 201, 204. Aside from there being no reason to either have Green, apply, and certainly none to so charge him (which might create a cause for him where none could, otherwise, ever exist) you ought to merely declare the thing, what it is - i.e., a "[non] permitted use"; otherwise, I'll. have Art. 78 relief in the form of Mandamus, with your Board paying the Costs again citing 'Fiorini'" (Ibid.) citing (55 CJS Mandamus, Art. 9, pp 31-32) — viz., 'It may be granted or refused depending on whether or not it promotes substantial justice".

But conniving with CE Officer Dekar to wrongfully and falsely, "grant" Green such "benefit", over mine and my Family's Fundamental Rights of Habitation, is compounding the unlawful and rendering it, illegal. "Oppression", is too kind a word.

Last Words on the Entire Matter

Now, you've a choice (1) Handle this matter, ad hoc, by stating that we needn't go as far as the question of

whether the structure was or shall require a use variance: because of its dangerous location, carrying noise, dust and disturbance and injurious damages beyond the dominion of the Green's property to the material annoyance and injurious damages to the Dyno's Real Property; and thus, depriving the Dyno's of their Rightful Use and enjoyment of their Real Property: such "structure" in question, cannot stand. Or, (2) Handle this matter, generally, by stating that all persons in R6, or areas with smaller lots, having such "structures", are hereby required to apply for a use variance, in order to fulfil the Due Process Equal Protection Rights of any adjacent property owners/possessors that may be adversely effected.

* * *

Unrelated: NYS Penal Law, 240.25, subdiv 5, has been amended, and is now 240.26, fmr. subdiv 5, is now subdiv 3.

Signed,

S/ Thomas Lamont Dyno

Thomas Lamont Dyno
6/16/96.

Mr. Dyno, Ms. Carole Cass and Mrs. Julia Dyno were present.

Mr. Dyno is appealing the decision made by the Village Attorney, William Gibson in regards to a Code interpretation; that a permit is not needed and there is no setback required for a basketball pole, backboard arid net that was' set up at 42 Academy Street.

Chairman Matyas asked Mr. Dyno to introduce the evidence and material to the Board.

Mr. Dyno presented a declaration (D1 to D3), enumeration of evidence (E1 to E2), and a brief (B-1 to B-8) and conclusion (C-1 to C-3).

Chairman Matyas accepted the material for the record to be added to Mr. Dyno's file.

Chairman Matyas stated the Board had read all the material that had been sent to them previous to the meeting.

Mr. Dyno also presented Exhibit VII to be added to the record.

Mr. Dyno stated also that he is submitting NYS statutes pertaining to the code and deposition forms from the Town of Union, corroboration on file at the Justice Court, regarding the construction of the basket, the use of the basket, dog control at the Town of

Union, in addition to various other problems regarding the dogs. Also, US Civil rights information that is pertinent to a certain degree, petition to Family Court which deals with the boy who erected the structure, several newspaper articles, letters to Mayor Lewis and the Chief of Police, and pictures. There is also Exhibit 3; Grounds points for declaration.

Exhibit A of the minutes gives Mr. Dyno's proposed procedure and and Exhibit B of the minutes is the cases cited by Mr. Dyno as part of his evidence.***B. Austin, Dep. Clerk***

Chairman Matyas accepted all of the above material to be added to Mr. Dyno's file.

Chairman Matyas held over the decision so the Board has time to review all the information stated and submitted.

The Board recessed at 9:18 PM and reconvened at 9:30 PM. The meeting was adjourned at 9:40 P.M.

Respectfully submitted,

Betty J. Austin
Deputy Clerk

NYS SUPREME COURT
COUNTY OF BROOME
SPECIAL TERM

In The Matter Of The Application
Of JULIA DYNO, THOMAS DYNO
And CAROL CASS

Petitioners

Index No.
1996002033
R.J. I. No.
96-1403-M

-against -

VILLAGE OF JOHNSON CITY,
VILLAGE OF JOHNSON CITY
ZONING BOARD OF APPEALS,
DANIEL W. GREEN, III and
MARY LOU GREEN

Respondents.

Assigned Judge:
Robert S. Rose

MEMORANDUM IN SUPPORT OF RESPONDENTS
VILLAGE OF JOHNSON CITY
VILLAGE OF JOHNSON CITY ZONING BOARD OF
APPEALS DENYING PETITIONERS' APPEAL

INTRODUCTION

Petitioners have commenced a special proceeding pursuant to Article 78 of the C.P.L.R. seeking to annul a determination of the Village of Johnson City Zoning Board of Appeals made at the July 15, 199E meeting of the Zoning Board affirming the decision of the Johnson City Code Enforcement Officer that a basketball backstop erected on land adjacent to Petitioner's premises did not violate ...**[A-64]**

[I]n determining if a board's action is arbitrary is whether there is no rational basis for the decision of

the board. Colton *v.* Berman 21 N.Y.2d 322.

The Zoning Board considered the applicable portions of the Village Code and determined by definition that the Green's basketball backstop violated no such provision. The Board considered the facts and determined that the backstop was a usual and customary use incidental and accessory to the principal use of the Green's property as a single-family residential dwelling.

The decision of the Zoning Board to deny Petitioners' appeal was not arbitrary and capricious. It was rational and based on all the facts laid before the board and the record amply recites these facts and the deliberations of the board.

Point X

THE DETERMINATION OF THE ZONING BOARD TO DENY PETITIONER'S APPEAL IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Substantial evidence is defined as evidence from which inferences of the existence of facts reasonably may be drawn. A mere scintilla of evidence is not sufficient. Francese v. Waterfront Comm. of New York Harbor. 56 A.D.2d 535. The facts presented in Points III and IV of this memorandum indicate that the decision of Respondents was not arbitrary and capricious and are apropos in determining if there was substantial evidence to support the Zoning Board's findings. First the board determined there was no section of the Code of the Village of Johnson City that regulated basketball backstops. Then the Board determined that backstops are a customary and incidental use of residential property. These determinations were set out on the record based on

evidentiary facts and the lack of contrary facts before the board, Petitioners submitted no evidence to the contrary. It wasn't a mere scintilla of evidence that the Zoning Board relied on in making its decision, it was a preponderance of evidence.

CONCLUSION

Procedurally, the Petition as to the Respondent Village of Johnson City Zoning Board of Appeals; should be dismissed for lack of jurisdiction.

A substantive analysis reveals that The Johnson City Zoning Board of Appeals followed proper procedure. They did not act arbitrarily and capriciously. They made no errors of law and their determination was supported by substantial evidence. Petitioners ...**[A65-A66]**

NYS SUPREME COURT:
APPELLATE DIVISION
3rd DEPARTMENT

In the Appeal of
JULIA DYNO,
THOMAS LAMONT DYNO
and CAROL CASS
Appellants

ORDER TO SHOW CAUSE
Preliminary Injunction &
Temporary Restraining
Order
Case No. 81030
Case No. 81770

- vs -

VILLAGE OF JOHNSON CITY,
VILLAGE OF JOHNSON CITY
ZONING BOARD OF APPEALS,
DANIEL W. GREEN III and
MARY LOU GREEN

PRESENT: Honorable Paul Yesawich, Justice.

Upon reading and filing the annexed affidavit of Thomas Lamont Dyno, duly sworn to the 9th day of March, 1998 and upon the following supporting papers and exhibits cited therein and attached thereto: (1) The affidavits of Thomas Lamont Dyno, Julia Dyno and Carol Cass; (2) the verified law brief of Thomas Lamont Dyno attached as an exhibit; (3) copies of photographs with descriptions of the properties in question, from that portion of the settled record submitted to the clerk at the Appellate Court.

ORDERED that the Respondents opposing this application, show cause by the filing of an affidavit in answer to the affidavit and supporting papers, attached hereto, at a motion term of this court to be held at the NYS Supreme Court Appellate Division 3rd Judicial Department, Box 7288, Capitol Station, Albany, New York 12224 on the 17th Day of March, 1998 at 1:30 o'clock in the afternoon of that day, or as

soon thereafter as counsel can be heard, why an order should not be made and entered herein, restraining and enjoining the Respondents Greens, pending the determination of the issues in this appeal from:

1. The use of a basketball basket structure located in a residential driveway 3' from the parallel side of Appellants' residence;

2. Use of the aforesaid driveway for any activities other than the quiet and orderly parking of the Respondents' car(s) in access to and from the premises; and

3. Noisy activities involving shouting, stereos, car radios, car horns and boom boxes unconfined to the dominion of such premises; and it is

~~ORDERED, that in the meantime and until the determination of the motion brought on by this order to show cause, and the entry of an order thereon, the Respondent Greens, be and they are hereby stayed, enjoined and restrained from:~~

~~1. The use of a basketball ball structure located in a driveway 3 'from the parallel side of Appellants' residence;~~

~~2. Use of the aforesaid driveway for any activities other than the quiet and orderly parking of the Respondents car(s) in access to and from the premises; and~~

~~3. Noisy activities involving shouting, stereos, car radios, car horns and boom boxes unconfined to the dominion of such premises.~~ [Lined out and initialed].

Sufficient cause appearing therefor, let service of a copy of this order an) the papers upon which it is

based, upon (a) the Respondent Daniel W. Green III *pro se;* (b) Mary Lou Green - *pro se,* and (c) upon the opposing counsel Stephen M. Sedor - appearing for the Respondent Village and Respondent Village Zoning Board of Appeals [by certified mail] on or before the 10th day of March, 1998, be deemed good and sufficient service thereof. And it is,

ORDERED, that this motion is submitted on: (a) the papers of this order; (b) the records of both appeals as submitted to the Appellate Court Clerk as cited in the supporting papers of this order; (c) and all proceedings had herein. Personal appearance in opposition is neither required nor permitted.

Signed this 10th day of March, 1998 at Cortland, New York.

ENTER

S/Hon Paul J. Yesawich
Hon. Paul J. Yesawich
Justice NYS Supreme Court
Appellate Division 3d Dept.

Thomas Lamont Dyno - in person
46 Academy Street
Johnson City, New York
13790-15 19
(607) 729 - 0839

SUPREME COURT APPELLATE DIVISION
THIRD DEPARTMENT

Decided and Entered May 20, 1999 81030

In the Matter of Julia Dyno, et al
Appellants

v

Village of Johnson City, et al
Respondents

Calendar Date: March 24, 1999

Before: Mikoll, J.P., Mercure, Crew III, Yesawich Jr. and Peters, JJ.

Thomas Lamont Dyno, Johnson City, appellant in person.

Coughlin & Gerhart LLP (Stephen M. Sedor of counsel), Binghamton, for Village of Johnson City, respondent.

Yesawich Jr., J.

Appeal from a judgment of the Supreme Court (Rose, J.), entered February 3, 1997 in Broome County, which, inter alia, dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent Village of Johnson City Zoning Board of Appeals that respondents Daniel W. Green III and Mary Lou Green did not violate the setback requirements of the Villages zoning ordinance

This appeal[1] has its genesis in the construction of a basketball backboard and hoop (hereinafter backboard) by respondents Daniel W. Green III and

[1]

Mary Lou Green on their property. Because of the noise assertedly generated by the backboard's presence, petitioners, the Greens' neighbors, complained to the Village of Johnson City Code Enforcement Office that its placement of less than five feet from petitioners' premises violated the minimum setback requirements imposed by local law. When that claim was ultimately rejected by respondent Village of Johnson City Zoning Board of Appeals (hereinafter the Zoning Board), petitioners commenced this proceeding against the Zoning Board and respondent Village of Johnson City (hereinafter collectively referred to as respondents) challenging that determination. After respondents interposed their answer, petitioners, acting pro se and without leave of court, filed an amended petition which, together with the petition, was in due course dismissed by Supreme Court. Petitioners appeal.

Their contention that Supreme Court erred by not accepting the petition as amended lacks force. Leave to amend pleadings is freely granted (see, Matter of Prendergast v Kingston City School Dist. , 242 AD2d 773, 774) provided, however, that the proposed pleading is not, as here, "plainly lacking in merit" (Sabol & Rice v Poughkeepsie Galleria Co., 175 AD2d 555, 556). The proposed amendments raised claims and sought relief not available by way of a CPLR article 78 proceeding (CPLR 7803); namely, private nuisance claims against the Greens and injunctive relief to enjoin them from using their property in an allegedly offensive manner (see, Leising v Town of Clarence, 144 AD2d 969, 970). And insofar as the amended petition seeks to have the Village enforce its local laws and zoning ordinances, it is in essence a

request for relief in the nature of mandamus (CPLR 7803 [1]), which does not lie to compel the performance of such a discretionary function (see, Manuli v Hildenbrandt, 144 AD2d 789,

Addressing the merits, we decline to disturb the Zoning Board's determination as it had a rational basis in the record and was supported by substantial evidence (see, Matter of Kahn v Zoning Bd. of Appeals of Vil. of Irvington, 87 NY2d 344, 351; Matter of Sasso v Osgood, 86 NY2d 374). The Zoning Board determined that the backboards placement 3.1 feet from petitioners property did not violate the five-foot sideyard setback requirement because that requirement applies only to buildings, and a backboard is not a building as that term is defined by the Village of Johnson City Code § 2 74-4 (B). Furthermore, while petitioners correctly note that a backboard is not specifically enumerated as a permitted use by local law, it is not unreasonable to conclude that it is a permissible 'accessory use', which is defined by Village of Johnson City Code § 274-4 (B) as one customarily incidental and subordinate to the principal use * * * and located on the same lot". That this is indeed a customary use is borne out by the number of private properties within the Village containing backboards.

Mikoll, J.P. Mercure, Crew III and Peters, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

S/Michael J. Novack
Michael J. Novack
Clerk of the Court

ADR, APPEAL, CLOSED
U.S. District Court Northern District of New York
[LIVE - Version 2.5L] (Binghamton)
CIVIL DOCKET CASE #: 3:01-cv-00321-NAM-DEP

Dyno v. Village Johnson City, et al
Assigned to: Chief Judge Norman A. Mordue
Referred to: Magistrate Judge David E. Peebles
Demand: $300,000
Cause: 42:1983 Civil Rights Act

Date Filed: 03//06/2001
Jury Demand: Plaintiff
Nature of Suit: 440 Civil
Rights: Other
Jurisdiction: Federal Question

Plaintiff
Thomas Lamont Dyno - Pro se
46 Academy Street
Johnson City, NY 13790-1519

v.

Defendant
Village of Johnson City by Todd D. Kilpatrick
Squire, Sanders Law Firm
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
216-479-8500
Fax: 216-479-8780
Email: tkilpatrick@ssd.com
LEAD ATTORNEY TO BE NOTICED

Defendant
Harry G. Lewis *Mayor of the Village of*
The Village of Johnson City
represented by **Todd D. Kilpatrick**

(See above for address)
LEAD ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/06/2001	1	COMPLAINT filed; FILING FEE $150.00 RECEIPT # 48610; Service deadline 5/5/01 for Mary Lou Green, for Daniel W. Green III, for Harry G. Lewis, for Johnson City (pta) (Entered: 03/07/2001)
03/06/2001		PRO SE HANDBOOK issued and explained to Thomas Lamont Dyno prior to the time complaint was filed (pta) (Entered: 03/07/2001)
03/06/2001		SUMMONS(ES) issued for Village Johnson City, Harry G. Lewis, Daniel Green III, Mary Lou Green (pta) (Entered: 3/07/2001)
03/06/2001		Filing Order Issued; Conference set before Magistrate Judge Gary L. Sharpe in Binghamton, Status Conference at 9:30 a.m. 7/16/01, Deadline for filing Case Management Plan, 7/6/01, ADR Track Case. (pta) (Entered: 03/07/2001)
03/07/2001		Handed Pltf waiver of service of summons forms for use (pta) (Entered: 03/07/2001)

04/06/2001	2	Order Directing Compliance as to Thomas Lamont Dyno. Ordered, that pltf file an affidavit with the Court within 30 day from the filing date of this Order establishing that Daniel W, Green III and Mary Lou Green are "state actors" for purposes of Section 1983 with respect to the matters complained of in his complaint. Should pltf fail to timely file the required affidavit, the file in this matter shall be dismissed as against the Greens w/out further order of this court; that upon the filing of pltf"s affidavit, the file in this matter be returned to the Court for further review. Dated Served: 4/6/01 Date Entered: 4/6/02 Notice of compliance due by 5/6/01 Clerk's action due by 6/5/01 (Signed by Norman A. Mordue) (jlm) Modified on 04/27/2001 (Entered: 04/06/2001)
04/26/2001	3	Pltf's Request for an Adjournment of the Rule 16 conference set for 7/16/01 (amt) (Entered: 04/26/2001)
04/26/2001	4	EX PARTE AFFIDAVIT of Thomas Lamont Dyno filed pursuant to the 4/6/01 [2-1]

		order of Judge Mordue. (jlm) (Entered: 04/27/2001)
06/04/2001	5	ORDERED, that pltfs [3-1] Request to extend the time in which he may effect service of process on the named defts and for an adjournment of the pretrial conference is DENIED; that pltf file an affidavit within 30 days establishing that the Greens are "state actors" under Section 1983 with respect to the matters complained in his complaint; that if pltf fails to file the second affidavit this action shall be dismissed as to the Greens without further order of this Court; that upon the filing of the second affidavit, the file be returned to the Court for further review. Set Notice of Compliance deadline to 7/4/01 (signed by Judge Norman A. Mordue) (jlm) (Entered: 06/04/2001)

06/22/2001	6	AMENDED COMPLAINT by Thomas Lamont Dyno, Answer due 7/2/01 for Mary Lou Green, for Daniel W. Green III, for Harry G. Lewis, for Village Johnson City, Service deadline 8/21/01 for Mary Lou Green, for Daniel W. Green III, for Harry G. Lewis, for Village Johnson City, amends [1-1] complaint (pta) (Entered: 06/22/2001)
6/22/2001		SUMMONS(ES) issued for Amended Complaint for Village Johnson City, Harry G. Lewis, Daniel W. Green III, Mary Lou Green (pta) Entered:06/22/2001
06/26/2001	7	SUMMONS Returned Executed as to Johnson City, Harry G. Lewis on 6/25/01: Answer due on 7/15/01 for Harry G. Lewis, for Johnson City (sfp) (Entered: 06/29/2001)
06/29/2001	8	SUMMONS Returned Executed personally as to Mary Lou Green on 6/27/01 Answer due on 7/17/01 for Mary Lou Green (sfp) (Entered: 06/29/2001)
06/29/2001	9	Summons returned unexecuted as to Daniel W. Green III (sfp) (Entered: 06/29/2001)
07/03/2001	10	SUMMONS Returned Executed as to Daniel W. Green III personally on 7/3/01: Answer due on 7/23/01 for Daniel W. Green III (pta) (Entered:

		07/03/2001)
07/06/2001	11	PRO SE PLTFS Proposed Civil Case Management Plan Submitted. (pta) (Entered: 07/06/2001
07/09/2001	12	Scheduling Notice: reset Filing Order Deadlines: IN PERSON Conference set before Magistrate Judge Gary L, Sharpe in Binghamton, Status Conference at 12:00 8/20/01 (drm) (Entered: 07/09/2001
07/16/2001	13	ANSWER to Complaint by Johnson City, Harry G. Lewis (Attorney Todd D. Kilpatrick), (amt) (Entered: 07/20/2001
08/10/2001	14	PRO SE PLTF MOTION by Thomas Lamont Dyno by Pltf for Sanctions, Hearing set for 9:30 a.m. on 9/17/01, Response Deadline 8/31/2001 Motion returnable before Mag. Judge: Gary L. Sharpe in Binghamton NY [Clerk re-schedule for correct date]; Memorandum of Law (pta) (Entered: 08/10/2001)
08/10/2001	15	AFFIDAVIT by Thomas Lamont Dyno in support of Re: [14-1] motion by Pltf for Sanctions as against Todd D. Kilpatrick, Esq. (pta) Entered: 08/10/2001)
08/10/2001	16	COURT NOTICE of re-noticing Pro Se Pltf's Motion For

		Sanctions [14-1] for 9-17-01 at 9:30 a.m. before Mag/Judge Gary L. Sharpe in Binghamton. Response papers due by 8-31-01) (pta) (Entered: 08/10/2001)
08/10/2001	17	NOTICE of Demand for Jury Trial and for Conference by Thomas Lamont Dyno (pta) (Entered: 08/10/2001)
08/10/2001	18	MEMORANDUM by Johnson City, Harry G. Lewis in opposition to [14-1] motion by Pltf for Sanctions (pta) (Entered: 08/10/2001
08/10/2001	19	AFFIDAVIT of Todd D. Kilpatrick, Esq. on behalf of Johnson City, Harry G. Lewis Re: [14-1] motion by Pltf for Sanctions (pta) (Entered: 08/10/2001)
08/21/2001	20	Minute entry of 8/20/01 Rule 16 conference; App: T. Dyno, Pro Se Pltf; T. Kilpatrick, Esq;, for Deft; CRD/ECRO: L. Vangeli; Tape: 120; If amended complaint survives order of Judge Mordue, Pltf will be allowed 60 days to file motion for summary judgment, Deft will be allowed 30 days for file motion to dismiss (amt) (Entered: 08/21/2001)
08/22/2001	21	APPLICATION of Thomas Lamont Dyno, Pro se Pltf for

		leave to file reply and additional relief w/Memorandum [forward for Mag/Judge Sharpe] (pta) (Entered: 08/22/2001)
08/31/2001	22	Supplemental AFFIDAVIT by Johnson City, Harry G. Lewis in opposition to [14-1] motion by Pltf for Sanctions (sfp) (Entered: 09/04/2001)
11/08/2001	23	MOTION REJECTION ORDER. Papers rejected: Pltf's Notion of Default pursuant to FRCP 55, Pltf's Notice of Motion pursuant to FRCP 56, Affidavit-Proof of Service by Mail, Statement of Material Facts, Party Affidavit, and Table of Contents. Motion for Entry of Default Judgment must be filed in accordance with L.R.7.1 (a). Motions must include an affidavit in support of Motion. Motions for default judgment cannot be filed unless there is an entry of default by the clerk under FRCP 55(a): the clerk has been directed to return this document without filing; Motion is rejected as premature. The 60 day deadline for filing this motion that was instituted during the 8/20/01 conference was contingent upon

		the acceptance of the Amended Complaint by Judge Mordue. There is no decision either accepting or rejecting the Amended Complaint at this time. (signed by Mag. Judge Gary L. Sharpe) Date Entered 11/8/01 (see) (Entered: 11/08/2001)
11/09/2002	24	Letter of Atty Kilpatrick to the Court dd 11/9/01 requesting the court disregard his previous correspondence dd 11/8/01 since he has received the court's rejection order (amt) (Entered: 11/13/2001)
11/21/2001	25	DECISION and ORDER, that Daniel W. Green and Mary Lou (Green) Price are dismissed as Defts in this action due to Dyno's failure to establish that they are "state actors" under Section 1983 with respect to the matters complained of in his amended complaint and the Clerk is directed to strike these Defts from the docket in this action; that in accordance with the determinations made by Mag. Judge Sharpe at the Rule 16 Conference on 8/20/01, the municipal Defts may file a motion to dismiss Pltfs amended complaint within 30

		days of the filing date of this Order. If no such motion is filed by Defts, Dyno shall have 60 days from the filing of this Order in which to file a motion for summary judgment. (signed by Judge Norman A. Mordue) Date Entered: 11/21/01 (see) (Entered: 11/21/2001)
12/12/200 1	26	ORDERED, that the [14-1] motion by Pltf for Sanctions pursuant to FRCivP 11 is DENIED. (signed by Magistrate Judge Gary L. Sharpe) Date Entered: 12/13/01. Date Served: 12/12/01. (jlm) (Entered: 12/13/2001)
12/20/2001	27	INTERRLOCUTORY NOTICE OF APPEAL by Thomas Lamont Dyno. from Order dd 11-21-01. FILING FEE $ 105.00 RECEIPT # 48863 Appeal record due on 1/19/02 (pta) (Entered: 12/27/2001)
12/26/2001	28	LETTER of Atty Kilpatrick on behalf of Johnson City, Harry G. Lewis pursuant to Local Rule 7.1(b) regarding Motion: Dismiss Date Served upon counsel: 12/20/01 (sfp) (Entered: 12/27/2001)

12/26/2001	29	MOTION by Defts Johnson City & Harry G, Lewis Dismiss the complaint [with attached affidavit in support of motion to dismiss]. Hearing set for 10:00 on 2/6/02, Response Deadline 1/23/02. Motion returnable before Judge Mordue (sfp) Modified on 01/28/2002 (Entered 12/27/2001)
12/26/200 1	30	MEMORANDUM of Law by Defts Johnson City, Harry G. Lewis in support of [29-1] motion to dismiss the complaint (sfp) (Entered: 12/27/2001)
12/27/2001		Notice of appeal and certified copy of docket to USCA re: [27-1] appeal by Thomas Lamont Dyno re: Order of 11-21-01 (parties noticed). (pta) (Entered: 12/27/2001)

12/27/200 1	31	Pltf Thomas Lamont Dyno's OBJECTIONS to the filing of deft's Motion to Dismiss. (jlm) (Entered:01/28/2002)
02/04/2002	32	MANDATE OF USCA (certified copy dtd 1/30/01) Re: [27-1] appeal by Thomas Lamont Dyno; It is hereby ORDERED that the motion for emergency relief be and it hereby is DENIED. (dmf) Modified on 04/22/2002 (Entered: 02/11/2002)
02/04/2002	33	MANDATE OF USCA (certified copy dtd 4/5/02): Appellant has filed, pro se, a notice of appeal from a district court order dismissing two defendants from his 32 U.S.C. Section 1983 action. Upon due consideration, is ORDERED that that appeal is sua sponte dismissed. As the district court dismissed the complaint as to some, but not all, defendants this Court lacks jurisdiction over the appeal because a final order has not been issued by the district court as contemplated by 28 U.S.C. section 1291. See Ruffolo v. Oppenheimer & Co., 949 F2d 33, 36 (2d Cir 1991) (dmf) Modified on 04/11/2002

		(Entered: 04/17/2002)
12/17/2003	34	ORDER Reassigning action to MJ Peebles for Discovery and Pretrial management; So Ordered. Signed by Judge Gary L. Sharpe on 12/17/03. (kcl,) (Entered: 12/17/2003)
12/17/2003		Judge David E. Peebles added. Judge Gary L. Sharpe no longer assigned to case. (kcl,) (Entered: 12/17/2003)
09/27/2004	35	ORDER granting [29] Motion to Dismiss. Signed by Judge Norman A. Mordue on 9/27/04. (kcl,) (Entered: 09/27/2004)
09/27/2004	36	JUDGMENT in favor of Defendants against Plaintiff (kcl,) (Entered: 09/27/2004)
09/27/2004	39	AMENDED DOCUMENT Amends caption listed in 35 Order on Motion to Dismiss; Error in caption corrected, no other changes made to Order (kcl,) Additional attachment(s) added on 10/15/2004 (jim,). (Entered: 10/13/2004)
10/07/2004	37	MOTION to Set Aside Judgment by Pro Se Pltf Thomas Lamont Dyno. [no return date stated] (Attachments: #(1) Affidavit of Service #(2) Affidavit in Support of Motion # 3 Memorandum of Law in

		Support of Motion #(4) Exhibits 1 - 3 #(5) Exhibits 4- 8 #(6) Exhibits 9 - 16 #(7) Exhibits 17-2 1, 23-26 #(8) Exhibits 27-34 #9 Exhibit 5, pg 1-74, Attorney Affidavit #(10) Exhibit 5, pg 75-111, Attorney Affidavit)(sfp,) (Entered: 10/08/2004)
10/08/2004		Rec'vd two VHS taped labeled Exhibit 22 and Exhibit 26 from Pro Se Pltf [placed in JF] (sfp,) (Entered: 10/08/2004)
10/13/2004	38	AFFIDAVIT re 37 MOTION to Set Aside Judgment by Village of Johnson City. (Attachments: #1) (Kilpatrick, Todd) (Entered: 10/13/2004)
10/13/2004	40	AMENDED DOCUMENT/ORDER Amendment to 35 Order on Motion to Dismiss; Document only amends caption of Order, no part of the 9/27/04 order has been altered (kci,) (Entered: 10/15/2004)
10/15/2004		CLERK'S CORRECTION OF DOCKET ENTRY; Clerk will be deleting document 39 file dated 9/27/04 entered by clerk 10/13/04 as the associate image is incorrect; Clerk will docket the amended document with correct image associated (kcl,)

		(Entered: 10/15/2004)
10/26/2004	41	NOTICE OF APPEAL as to 36 Judgment; filed by Pro Se Pltf Thomas Lamont Dyno. Filing fee $ 255 pd, receipt number BNG000047. (sfp,) (Entered: 10/26/2004)
10/26/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 41. Notice of Appeal (sfp,) (Entered: 10/26/2004)
10/26/2004		Certified and Transmitted Index to Record on Appeal to US Court of Appeals re Pro Se Pltf 41 Notice of Appeal (sfp,) (Entered: 10/26/2004)
10/29/2004		Record on Appeal to US Court of Appeals re 41 Notice of Appeal accompanied by index and cover letter prepared by S. Potter in Bing. (kcl,) (Entered: 10/29/2004)
11/05/2004	42	REPLY to 38 Response to Motion re 37 MOTION to Set Aside Judgment filed by Thomas Lamont Dyno. (sfp,) (Entered: 11/05/2004)
11/05/2004	43	MEMORANDUM OF LAW in support of 42 reply filed by Thomas Lamont Dyno. (sfp,) (Entered: 11/05/2004)
11/08/2004	44	NOTICE of CCA receipt of appeal dd 11/2/04 (sfp,)

		(Entered: 11/08/2004)
11/15/2004	45	NOTICE of Docketing Record on Appeal from USCA re 41 Notice of Appeal filed by Thomas Lamont Dyno. USCA Case Number 04-5747 (tab) (Entered: 11/16/2004)
10/13/2006	46	ORDER denying the 3J Motion to Set Aside Judgment. Signed by Judge Norman A. Mordue on 10/13/06. Served on pltf via USPS on 10/13/06. (jlr/kf) (Entered: 10/13/2006)
10/13/2006		Order mailed to pro se pltf. Appeals court notified by telephone that the motion has been decided. Appeal is now effective. (jlr) (Entered: 10/16/2006)
10/25/2006	47	USCA Scheduling Order as to 41 Notice of Appeal filed by Thomas Lamont Dyno. USCA Case No. 04-5747-cv. Appealed to: Second Circuit USCA. (ban) (Entered: 10/30/2006)
11/03/2006	48	SUPPLEMENTAL ELECTRONIC CERTIFICATION to US Court of Appeals of Record on Appeal re 41 Notice of Appeal. (ban) (Entered: 11/03/2006)

Docket Number:	04-5747-cv
Short Title:	Dyno v. Village Johnson City
DC Docket Number:	01-cv-321
DC:	NDNY (BINGHAMTON)
DC Judge:	Honorable David Peebles Honorable Norman Mordue

NOTICE OF HEARING DATE

Date of Hearing: Thursday, May 17, 2007
Time Allotted for Oral Argument: 5 mins per side

The above referenced appeal is scheduled for oral argument on the day indicated in the Ceremonial Courtroom (9th Floor), Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, Manhattan, New York City.

Court convenes promptly at 10:00 a.m. Counsel and non-incarcerated pro se litigants must be present for argument unless earlier excused. Motions to adjourn argument must be promptly made and will be granted for grave reason only.

Counsel and non-incarcerated pro se litigants presenting oral argument must register with the courtroom deputy no later than 9:30 a.m.. Please be advised that, due to the technical difficulties, we are unable to provide offsite Video Argument until further notice. It is hoped that we will again be able to offer this convenience in the future.
Counsel and non-incarcerated pro se litigants may seek the Court's permission to waive oral argument by submitting a letter request to the Office of Clerk (attention Calendar Deputy) not later than five days before the hearing week.

Report all settlements to the Calendar Deputy as soon

as effected. Ordinarily, and subject to the ruling of the presiding judge, motions or stipulations to withdraw with prejudice will be granted without appearance by counsel, but motions or stipulations to withdraw without prejudice filed within three business days of the argument will be considered at the time of argument, with counsel present and prepared to argue the merits.

Thomas
Asreen, Acting
Clerk

Complete Items below and return copy of entire form to the Clerk' s Office

Name of the Attorney/Pro Se Presenting argument
Firm Name (IF APPLICABLE):
Current Telephone Number.
The above named Attorney Represents

Offsite Video Argument. Please be advised that, due to the technical difficulties, we are unable to provide offsite Video Argument until further notice. It is hoped that we will again be able to offer this convenience in the future.

AudioTape of Argument. An audio tape of an argument may be purchased for $26 per tape by written request to the Clerk. The request should include the case name, the docket number and the date or oral argument. Tapes will be delivered by first class mail unless the request instructs to hold for pick-up or requests Federal Express Service, in which case a Federal Express account number and envelope must be provided.

Court Reporters. Parties may arrange - at their own expense - for an official court reporter to transcribe argument from a copy of the hearing tape or to attend and transcribe the hearing directly. A party must first obtain written consent from opposing counsel - or move the Court for permission - to have the court reporter attend and transcribe the hearing and must provide the calendar clerk written notice, including the name, address and telephone number of the attending reporter and, if applicable, the reporting firm at least one week prior to the hearing date.

An original and three (3) copies of the transcript must be submitted to the Clerk for approval by the panel that heard the case; transcripts will not be officially filed until approved.

Interpreter Services **for the Hearing** Impaired. Counsel requiring sign interpreters or other hearing aids must submit a written request to the Calendar Team at least two weeks before oral argument

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS LAMONT DYNO,
Plaintiff

- v - 3:01-CV-0321

The VILLAGE OF JOHNSON CITY;
and HARRY 0. LEWIS,
Mayor of the Village of Johnson City,
Defendants.

APPEARANCES: OF COUNSEL:

THOMAS LAMONT DYNO
Plaintiff Pro Se
46 Academy Street
Johnson City, New York
13790-1519

COUGHLIN & GERHART, L.L.P. Todd D.
Attorneys for Defendants Kilpatrick,
20 Hawley Street Esq.
P.O. Box 2039
Binghamton, New York 13902-2039

NORMAN A. MORDUE, Chief US. District Judge

MEMORANDUM-DECISION AND ORDER

By Order dated October 13, 2006, this Court denied plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). The judgment from which plaintiff sought relief was a September 27, 2006, Memorandum-Decision and Order which dismissed plaintiffs amended complaint for failure to state any legally viable cause of action pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff filed a timely appeal of the

September 27, 2006, Memorandum-Decision and Order. Thereafter, plaintiff filed an untimely Notice of Appeal of the Court's October 13. 2006, Order on November 20. 2006. Presently before the Court is plaintiff's motion filed via order to show cause for an order accepting his November 20, 2006, Notice of Appeal as timely pursuant to Fed. R. Civ. Proc. 6(a) and (e), or in the alternative for an extension of time within which to file a Notice of Appeal.

The Court has reviewed plaintiffs moving papers and has determined that Fed. R. Civ. Proc. 6 is not applicable to Notices of Appeal. *See Cordon v. Greiner,* 274 F. Supp2d 434,436 (S.D.N.Y. 2003) ("The 30-day requirement of Fed. R App. P. 4(a) is not affected by Fed. R. Civ. P. 6(e); since appeal time starts from the entry of the judgment and not from service of the notice, Rule 6(e) does not apply so as to enlarge the time allowed for filing the notice of appeal."), see also In re *Orbitec Corp.,* 520 F.2d 358, 362 (2 Cir. 1975) (timely filing of notice of appeal is "mandatory and jurisdictional," and "of the utmost importance;" thus requirements of FRAP 4(a)(1) with respect to the time for taking an appeal have long been treated as especially rigid.)). Based thereupon, the Court will not accept plaintiff's Notice of Appeal filed on November 20, 2006, as timely.

As a further matter, the Court notes that plaintiff has failed to demonstrate excusable neglect for his failure to have complied with the 30day filing requirement of Fed. R. App. P. 4(a). *See O.P.M. Leasing Sen's., Inc. v. Far West Fed. Savings and Loan Assoc.,* 769 F.2d 911,916 (2d Cir. 1985) ("the burden of demonstrating excusability lies with the party seeking the extension and a mere concession of

palpable oversight or administrative failure generally has been held to fall short of the necessary showing....").

Based thereupon, it is hereby

ORDERED that plaintiffs motion for an order directing acceptance of his November 20, 2006, Notice of Appeal as timely or enlargement of the time for filing a Notice of Appeal is

DENIED.

Dated: March 27, 2007
Syracuse, New York

S/Norman A. Mordue
Norman A. Mordue
Chief United States
District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

~~~~~~

THOMAS LAMONT DYNO *Plaintiff*	**NOTICE OF APPEAL**
v.	
The Village of Johnson City Harry G. Lewis, Mayor & Daniel W. Green III and Mary Lou Green Adjacent property owners *Defendant(s)*	Civil Case # 3:01-CV-0321 42 USC §1983 Monell Action Hon. Norman A. Mordue

~~~~~~

PLEASE TAKE NOTICE that Thomas Lamont Dyno, Plaintiff in the above named case hereby appeals to the United States Court of Appeals for the 2nd Circuit from the Judgment of Norman A. Mordue issued September 27, 2004 and from a non-final order issued November 21, 2001 dismissing the Greens as parties. I'm filing this Notice of Appeal against my will because the decision accompanying said Judgment indicates that dismissal is on the perjury and deceit of Village attorney Todd D. Kilpatrick, which said Judge held conclusive against me, thus dismissing under color of FRCP 12(b)(6) claims I've never made; while the remainder of the decision indicates dismissal on my failure to submit material evidence to support my claims **Scheuer *v* Rhodes** 416 US 232, 236 **Gomez *v* Toledo** 446 US 635 **Leatherman *v* Tarrant County NICU** 507 U.S. 163, which I have done by FRCP 60(b) motion filed within 10 days of said judgment; *as a pro se* I'm presuming that **Skiff *v* Hodge** 269 F 3d 155, 157-158 indicates that taking this appeal does not

annihilate said motion: *furthermore* that if the heightened pleading standard demanded by said Judge were upheld then leave to amend my *pro se* complaint ought to be allowed freely because any conceivable omission(s) is set forth in said motion so there is no reason for said Judge to sustain Judgment on perjury or heightened pleading standards except to incur unnecessary expense in time and money and potential absolute finality on deceit facilitated by concealment of evidence; and that this appeal is taken from each and every part of said orders. I do hereby affirm under penalty of perjury that the foregoing is true

DATED: October 26, 2004

S/ Thomas Lamont Dyno

Thomas Lamont Dyno – Pro se
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13790-1519
Phone: 607-729-0839

Todd D. Kilpatrick
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Thomas Lamont Dyno	Amended Notice
Plaintiff	of Appeal
v	Civil Case # 3:0l-cv-0321
The Village of	Monell Action
Johnson City	42 USC 1983
Defendant	Hon. Norman A. Mordue

PLEASE TAKE NOTICE - I the undersigned as Plaintiff-Appellant in the above case amend my October 26, 2004 Notice of Appeal and include in my appeal to the U.S. Court of Appeals 2d Circuit from the final Judgment of Norman A. Mordue issued September 27, 2004 and his non-final order issued November 21, 2001: my additional challenge of his order dated October 13, 2006 denying my FRCP 60(b) motion filed within 10 days of said judgment obtained by fraud on the court *more specifically* the Village answered my complaint and then moved by perjured affidavit under FRCP 12(b)(6) to misled said Judge into dismissing my case on claims having no factual basis in the pleadings. This appeal is taken from each and every part of said orders.

Essentially, a former Village attorney secured CPLR ¶78 Judgment by fraud on the court claiming that the Village zoning board made a decision and invoked grounds, which their actual decision disproves. The Judge relying on the lawyer's words and presuming said Board decided something it never did deprived me of procedural due process under CPLR 7804 and based judgment on said deceit. The Village officially adopted said judgment as authority for 3 official policy actions to my injury in fact imposing what they

concede is a private nuisance before the matter was appealed: thereby depriving me of my right of action against a zoning violation and my property rights protected under the due process and equal protection clauses of the 14th Amendment to the US Const. What said policy actions are and the protected rights I was deprived of are clearly specified in my complaint. The facts are not controverted except that the Village claims said ¶78 Judgment is valid authority for said policy actions and further claims without any basis in my complaint that I applied for relief in the form of mandamus to compel the Village to prosecute private individuals, which is a complete fabrication and which I deny.

If for any reason a higher pleading standard is required, leave ought to be freely allowed.

DATED:
November 20, 2006

S/ Thomas Lamont Dyno

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(2)

No. 07-905

FILED
MAR 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THOMAS LAMONT DYNO,

Petitioner,

v.

VILLAGE OF JOHNSON CITY, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PROCEDURAL HISTORY

Petitioner, Thomas L. Dyno, commenced an action in the United States District Court for the Northern District of New York pursuant to 42 U.S.C. § 1983 ("§ 1983") alleging that the Respondent, the Village of Johnson City ("Village"), violated his civil rights.[1] The allegations in Mr. Dyno's federal Complaint were repeatedly presented in New York's state trial and appellate courts, which found his claims to be without merit.[2] The Village filed a motion to dismiss Mr. Dyno's federal claims pursuant to F.R.C.P. 12(b)(6), which was granted by the Northern District of New York. Mr. Dyno appealed this decision to the U.S. Second Circuit Court of Appeals, which likewise dismissed his claims. He now seeks review of his case by the U.S. Supreme Court.

---

1. The Village is the only respondent listed on Mr. Dyno's Petition. The Second Circuit affirmed the dismissal of Mr. Dyno's claims against the Village's Mayor, Harry G. Lewis, and his former neighbors, the Greenes. Mr. Dyno's Petition here does not appear to challenge the dismissal of those claims, but to the extent necessary, the propriety of the Circuit Court's dismissal of the claims against Mayor Lewis, individually, is addressed in Point I, *infra*.

2. As noted in the September 27, 2004 Decision and Order of District Court Judge Mordue, Mr. Dyno "is a well-known litigant in the state courts having brought a series of *pro se* actions and proceedings before administrative agencies and state courts over the last eight years." (A-8) Judge Mordue's Decision sets forth a succinct history of Mr. Dyno's numerous attempts to present the same claims in various forums. (A-8 – A-10)

ARGUMENT

As stated by the Second Circuit below, to succeed on a § 1983 claim, a plaintiff must show that a defendant, acting under color of state law, deprived the plaintiff of a constitutional right. (A-3 – A-4) (*citing Rendell-Baker v. Kohn*, 457 U.S. 830, 838, (1982); *Rodriguez v. Phillips*, 66 F.3d 470, 481 (2d Cir. 1995)). The Second Circuit properly dismissed Mr. Dyno's Complaint because he failed to state a viable claim that the Village's mayor, Harry G. Lewis, was personally involved in depriving Mr. Dyno of a constitutional property right, or that the Village had an official custom or policy "to refuse to enforce zoning regulations or to rely on allegedly improperly obtained state court judgments[,]" which deprived him of constitutionally protected property rights. (A-5) In addition, the Circuit Court was correct in holding that Mr. Dyno's claims could have been dismissed on *res judicata* grounds because he should have raised them in his actions before the state courts. (A-5) Accordingly, the Second Circuit's decision dismissing Mr. Dyno's Complaint should be affirmed.

Point I

The Second Circuit properly held that Mr. Dyno failed to state a claim sufficient to attach personal liability to Mayor Lewis.

The Second Circuit properly held that Mr. Dyno failed to state a viable § 1983 against Mayor Lewis in a personal capacity. As noted by the Circuit Court,

> [P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to

> an award of damages under § 1983, and can occur by direct participation in the alleged violation, a supervisory official's failure to remedy a wrong, a supervisory official's creation of a policy or custom under which unconstitutional acts occurred, or through a supervisory official's gross negligence in managing his subordinates.

(A-4) (*citing Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986) (*quoting McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977)). The Circuit Court went on to note that since Mr. Dyno failed to present any argument or facts that distinguish the actions of Mayor Lewis from the Village, other than that the mayor implemented a supposed Village custom or policy, liability could not attach to him. (A-4)

The Circuit Court's decision dismissing Mr. Dyno's claims against Mayor Lewis, personally, was appropriate. In order to defeat the Village's motion to dismiss, Mr. Dyno's Complaint must have alleged that Mayor Lewis was personally involved in the deprivation of his constitutional rights. Mere conclusory statements and "bald assertions" do not suffice. *Davis v. County of Nassau*, 355 F. Supp. 3d 668, 677 (E.D.N.Y. 2005). A § 1983 complaint that does not allege personal involvement is "fatally defective on its face." *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987). Thus, the law is quite clear that personal liability will attach only if there is proof of direct individual participation in the acts allegedly resulting in a constitutional violation.

Mr. Dyno failed to make any claims about Mayor Lewis' personal involvement in this matter, other than the Mayor's assertion that the Village would comply with a state court's decision. As noted by the courts below, Mr. Dyno failed to set forth any facts indicating what, if anything, Mayor Lewis did to violate his constitutional rights. Mr. Dyno has failed to address this issue with any specificity. Indeed, his only claim in this regard is that Mayor Lewis, as the Village's chief executive officer, informed him that the Village intended to comply with the decision of the New York State Supreme Court, which dismissed Mr. Dyno's challenge to the decision of the Village's Zoning Board of Appeals. This lone statement does not meet the personal participation requirement. A defendant in a § 1983 claim cannot be held liable simply because he held a high position of authority. *Davis*, 355 F. Supp. 3d at 676. In the absence of personal participation in the alleged constitutional violation, Mr. Dyno's claim against Mayor Lewis is insufficient and was properly dismissed by the Second Circuit.

Point II

The Second Circuit correctly held that Mr. Dyno's Complaint fails to state a viable § 1983 against the Village.

Similar to its dismissal of the claims against Mayor Lewis, the Second Circuit properly dismissed Mr. Dyno's Complaint against the Village. To impose liability on the Village under § 1983, Mr. Dyno must prove that the Village had a "municipal custom or policy" that caused the violation of his constitutional rights. (A-4) (*citing Dwares v. New York*, 985 F.2d 94, 100 (2d Cir. 1993)).

Because Mr. Dyno did not distinguish between the actions of the Village and its mayor, the Second Circuit held that his claim depends entirely on (1) his ability to show an improper municipal custom or policy that (2) deprived him of a constitutional right. (A-4) He failed to do either and his Complaint was, therefore, properly dismissed.

A. Mr. Dyno's Complaint fails to set forth a municipal custom or policy that resulted in constitutional violations.

Mr. Dyno argues that the Village improperly relied upon the decision of the New York State Supreme Court dismissing his challenge to the Village's interpretation of its zoning ordinance to prohibit his neighbors from using their basketball hoop. He contends that this judgment was obtained by a fraud on the court. As noted by the Second Circuit, this issue was fully litigated in the state courts and Mr. Dyno's position was rejected.[3] In the subsequent federal litigation now before the Court, Mr. Dyno contends that the Village's reliance on this state court judgment represents a "policy action" that deprived him of constitutional rights.[4] This assertion

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3. The Village flatly rejects that it, or its attorneys, perpetrated any fraud upon any court or tribunal involved in this matter. Thus far, all courts considering Mr. Dyno's claims in that regard have dismissed his allegations.

4. *See, e.g.*, page 20 of Mr. Dyno's brief, wherein he states, "Please note, I'm not asking you to vacate said ¶78 judgment but want a declaration that it cannot serve as the basis of legitimate municipal policy[,]" and page 7, "The Federal causes of action arose, 1st on March 6 1998, when the Mayor adopted said ¶ 78 judgment as the basis of his policy decision and the course of Village policy actions, which flowed therefrom."

is specious. Reliance on a court decision does not represent a formal policy, nor has Mr. Dyno made "any allegation that it was the official policy of the Village to refuse to enforce zoning regulations or to rely on allegedly improperly obtained state court judgments." (A-4 – A-5) As the Second Circuit pointed out, Mr. Dyno merely argues "that the Village misinterpreted the relevant zoning provisions and subsequently relied on a state court judgment to affirm those misinterpretations. . . ." (A-5) Contrary to Mr. Dyno's contention, the Village engaged in no wrongdoing by relying on the state court judgment, and he has not provided any legal precedent to indicate that doing so was inappropriate.

Mr. Dyno also repeatedly asserts that the Village trampled his rights by "suing" him and vigorously opposing him in the state court proceedings. (*See, e.g.*, A-5 and A-16) This claim is without merit because it fails to demonstrate an impermissible municipal custom or policy, and is disingenuous. Mr. Dyno fails to disclose that after his initial challenge to the Village's interpretation of its zoning ordinances was dismissed, he named the Village as a party in an application for a preliminary injunction to prohibit his neighbors from using their basketball hoop while his appeal from that dismissal was pending. In response, the Village sought to enjoin him from filing further claims, which was granted. (A-9 – A-10, A-76 – A-77) Mr. Dyno characterizes this action as the Village "suing" him, but the Village did nothing more that respond legally to his claim. The Village's opposition to Mr. Dyno's application does not equate to a municipal policy or practice. Further, it did not serve to deprive Mr. Dyno of any right. The final decision on the Village's application was left to the court.

The Village's application for a preliminary injunction to prohibit him from filing further claims arising from the same facts and circumstances was based on a sound legal foundation. Mr. Dyno's continued attempts to litigate the same claims were, and are, a drain on Village finances and a waste of its officials' time. The Village's decision to pursue injunctive relief was not a policy determination, but rather a legal decision precipitated by Mr. Dyno's own conduct. He makes no allegation that the Village had a policy or custom of seeking injunctive relief against its citizens, or even if it did, that such custom or policy violated his constitutional rights.[5] The Village's decision to seek an injunction to prevent Mr. Dyno from bringing further baseless litigation was neither a policy action nor unlawful. The state court's decision to grant a preliminary injunction against such further claims affirmed the solid legal foundation for the Village's action. As Mr. Dyno has failed to allege any facts to support an inference that a formal practice, policy or custom endorsed by the Village ever existed, the Second Circuit properly dismissed his Complaint.

B. Mr. Dyno's Complaint fails to set forth any cognizable constitutional violations.

Even if Mr. Dyno could demonstrate the existence of an improper municipal custom or policy, he fails to identify a cognizable constitutional right that was violated or establish that the policy led to a violation of such right. In order to establish municipal liability, the policy alleged must be the moving force behind, and actually cause, the violation of constitutional rights.

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5. The Village has no such policy.

(A-13) (*citing Monell v. Dep't of Soc. Serv. Of the City of N.Y.*, 436 U.S. 658, 692 (1978)). Here, Mr. Dyno has failed to make the slightest showing that he suffered the deprivation of any constitutional right due to action taken by the Village.

Mr. Dyno argues that the Village violated his due process rights by following the state court decisions dismissing his claims, thereby denying him the opportunity to fully present those claims. (*See, e.g.*, Mr. Dyno brief pp. 13, 14) This allegation is completely unfounded as he has had numerous opportunities to present his claims to both state and federal courts. Indeed, Mr. Dyno's grievance is not that he has not been afforded an opportunity to present his claims, but rather that he has not liked the results. *See Brault v. Town of Milton*, 527 F.2d 736, 738-39 (2d Cir. 1975).

Mr. Dyno also seems to assert that the Village violated his due process rights by interpreting its zoning ordinance and complying with the state court rulings, thereby insinuating itself into his dispute with his neighbor *on their side*. (A-23, A-24) This claim is absurd, particularly since the Village chose *not* to intervene in Mr. Dyno's dispute with the Greenes. The Village merely determined that the Greene's use of their basketball hoop within a residential neighborhood was not a zoning violation and, therefore, it could not cite them for any violations. In doing so, the Village did nothing to deprive Mr. Dyno of the use of his property.

Mr. Dyno also argues that the Village imposed a private nuisance upon him by failing to stop his neighbor's use of their property in a manner he found

objectionable. (A-12 – A-14) The specious nature of this claim is obvious. If Mr. Dyno believed that his neighbors' use of their property created a private nuisance, his proper course of action would have been to bring a civil claim against them. He never took advantage of this opportunity, but instead decided to pursue claims against the Village. His pursuit of the Village has been, at the least, misguided, which is why the Second Circuit properly disposed of his Complaint.

Point III

The Second Circuit properly found that Mr. Dyno's claims are barred by *res judicata*.

The Second Circuit properly found that all of the claims Mr. Dyno has attempted to bring before the federal courts were, or could have been, litigated in the state court proceedings and were, therefore, barred by the doctrine of *res judicata*. (A-5) In *Collard v. Village of Flower Hill*, 759 F.2d 205, 207 (2d Cir. 1985), the Second Circuit affirmed the dismissal of a § 1983 claim on *res judicata* grounds by stating that "a district court is precluded from hearing a claim that could have been but was not raised in a state court proceeding, if the courts of that state would be precluded from hearing that claim." According to the *Collard* court, *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984), dictates that a federal district court is precluded from hearing a claim that could have been, but was not, raised in a state court proceeding if the courts of that state would likewise be precluded from hearing that claim. *Id.* For example, under New York law, if the constitutional claims that form the gravamen of a federal district court action could have

been brought in an earlier state court proceeding, the New York law of claim preclusion bars those subsequent claims from being brought in state court. *See Kovarsky v. Housing Develop. Admin.*, 31 N.Y.2d 184 (1982). Such is the present case regarding Mr. Dyno's claims.

While Mr. Dyno's § 1983 claims were not litigated in the state court proceedings, all of his claims are based on the same facts and circumstances as alleged in those prior actions. Certainly, the state courts would not hear Mr. Dyno's claims that the Village relied upon a "bad" decision as a basis for a § 1983 civil rights claim, and neither should the federal courts. The Second Circuit correctly found that Mr. Dyno's situation was indistinguishable from the circumstances in *Collard* as he "clearly could have raised his claims regarding the Village's alleged municipal policy in his Article 78 proceedings." (A-5) Accordingly, his Complaint was properly dismissed on the grounds of *res judicata* (*i.e.*, claim preclusion).

CONCLUSION

Based on the foregoing, the Village respectfully contends that the Second Circuit's decision dismissing the Complaint be affirmed in its entirety, together with such other relief that the Court deems appropriate.

Respectfully submitted,

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Docket # 07 - 905

Supreme Court of the United States

Thomas Lamont Dyno

Petitioner

v.

The Village of Johnson City

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

Reply to Brief in Opposition

Thomas Lamont Dyno
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REPLY ARGUMENT

This suit challenges the constitutionality of official Village policy action under color of her zoning ordinance.

The Brief in Opposition **[BO]** in support of **FRCP 12(b)(6)** dismissal generally ignores the express words of my complaint and petition; attempts to misrepresent my claims, compounds fraud on the court **[Pttn 11-12]**; and while the **[BO]** relies on two conclusory statements claiming that I failed to show (1) any Village policy, custom, or (2) the deprivation of any Constitutional right **[BO 5, ¶1]** the alleged facts intended to support those statements reveal policy and policy actions to which municipal liability may attach under Monell **[Pttn 15-18 ff. 17-18]** with said actions subjecting and causing me to be subjected to the deprivation of rights protected under the U.S. Const. **[id 14, 23-25].**

The **[BO]** concedes that the Village made a deliberate choice to follow a course of action based on dismissal of a petition for mandamus to review a Village zoning board decision and does not deny being the driving force behind said action **[Pttn 16-17; 4-6, 8. ¶1]**:

My 3rd Cause of Action - challenges the constitutionality of the Village policy decision to institute a civil action to enjoin me from suing her pro se and **[BO 7]** joining issue she asserts that

> "The Village's decision to seek an injunction to prevent Mr. Dyno from bringing further baseless litigation was neither a policy action nor unlawful"

Under **Pembauer *v* Cincinnati** 475 US 469, 481-484 the foregoing constitutes official policy action **[Pttn 17]**. And while the purpose of that policy may be to conceal her fraud and obstruct a trial she can't win her action deprived me of my Federally protected right of access to the courts and further subjected and caused me to be subjected to a private intentional nuisance in fact depriving me of my property, without due process hearing **Brd of Regents *v* Roth** 408 US 564, 571-572, 577 **[Pttn 23-24]** *see also* **[id 14, 23]**.

Because **JCNY *v* Dyno** is based on said judgment obtained by fraud on the court it is barred by the Clean Hands doctrine **Keystone Driller Co v General Excavator** 290 US 240, 241-245. The **[BO]** does not deny the facts that establish said fraud **[Pttn 11, ¶2]** but merely denies fraud.

My 2nd Cause of Action - misrepresented in **[BO 6]** *cf* **[Pttn 5, 16]** challenges the constitutionality of the Village decision to oppose preliminary injunctive relief against a private use of property "while [my] appeal from that dismissal was pending" **[BO]** claims:

> "The Village's opposition to Mr. Dyno's application does not equate to a municipal policy or practice"

Under **Pembauer** *op cit supra* the foregoing is official policy action based on an arbitrary Village discrimination between the equal rights of adjacent property holders **[Pttn 23]** **Booth *v* R.W. & O.T.R.R. Co**, 140 NY 257, 274-275, 35 NE 592 *in pari materia* a use of land whose legality was never determined **[Pttn 8, 3; 12-14]** this violates US Const due process and equal protection and is actionable under Monell.

My 1st Cause of Action - is also misrepresented and obfuscated by **[BO 4, ¶1]**.

The "individual capacity" fabrication is adequately addressed in my petition **[Pttn 16, ¶1]**. The Village conceded by her answer pleading that at all times set forth in my complaint that the Mayor was acting in his official capacity **[Pttn 6-7 *ff.* 6 last ¶¶; 18]**.

My complaint challenges the constitutionality of official policy making decisions and actions of the Village for which she may be found liable under **Pembauer** *op cit supra* for violations of Federally protected rights. The **FRCP 12(b)(6)** motion ought to be denied **[Pttn 19]** and the matter remanded.

[BO, id] states:

> "Mr. Dyno has failed to address this issue with any specificity. Indeed his only claim in this regard is that Mayor Lewis as the Village's chief executive officer, informed him that the Village intended to comply with the decision of the New York State Supreme Court, which dismissed Mr. Dyno's challenge to the decision of the Village's Zoning Board of Appeals. This lone statement does not meet the personal participation requirement"

The Village is required to comply with the Federal Constitution, which she failed to do. The foregoing statement concedes that the State court proceeding was dismissal of a petition to review a zoning board decision. Said dismissal was issued February 3, 1997. The Village decision/determination to use that dismissal was made in early March 1998.

My complaint is clear, I called the Police, and they refused to act because the Mayor acting in his official capacity and based on said judgment ordered them not to intervene against said use **[A43-46 *ff.* ¶19].** Said decision and policy action subjected and caused me to be subjected to a private intentional nuisance in fact and deprived me of Police protection "for reasons wholly unrelated to any legitimate state objective" **[Pttn 6, n.3]** citing **Village of Willowbrook *v* Olech** 528 US 562, 120 S. Ct. 1073, 145 L. Ed 2d 1060, from whence further actions flowed, and thus:

> "[A] deliberate choice [by the Village] to follow a course of actions [was] made from various alternatives '

(Quoting **Pembauer**. *op cit supra* @ US 481-484 **[Pttn 17-18]**) all of which gave rise to Federal causes of action as set forth in my complaint **[Pttn 7, ¶5]**.

The zoning board is not party to this suit, which challenges the constitutionality of official Village policy decisions and course of action in re application and execution of her zoning ordinance on grounds not raised by the zoning board, which I had no full or fair opportunity to challenge, subjecting me to an injurious use whose legality is not determined.

Nuisance under NYS Law

Copart Ind., *v* Con Ed 41 NY 2d 564, 569, 571:

> "[O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable"

> "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct"

III Blkstn 217-218

> "[T]hat if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property it is a nusance [sic]: for it is incumbent on him to find some other place to do the act where it will be less offensive"

Under NYS law Trial by Jury is guaranteed for a nuisance action **[Pttn 23] NYS CPLR 4101.2.**

In re **Copart**, *supra* the Village and my neighbors could see that the use was destroying my enjoyment of life and property by an intentional and unreasonable invasion of my home with noise; the Village Police documented damages resulting from the close proximity to my house. The use is a private intentional nuisance in fact (see **Black's Law Dictionary**, 7th Edition). Would a Jury agree? Well the Mayor decided, no Jury is required, here's a judgment obtained on our lawyer's lie which Dyno had no opportunity to challenge let him pay a $5 grand retainer move into a motel or buy the property, the Village is immune **[Pttn 6, ¶5]** the **[BO 9, ¶1]**.

> "If Mr. Dyno believed that his neighbors' use of their property created a private nuisance, his proper course of action would have been to bring a civil claim against them"

Aside from having to buy the property and pay $2 grand a year in taxes for an empty adjacent building as the only means to prevent someone else from using it as a nuisance again: what ought to shock you about this situation is the Village idea that an intentional and unreasonable invasion of my property depriving me of my enjoyment thereof may be something a court says no to; but if government lies and says her zoning ordinance makes such use legal then too bad for me, government has a preferred position over the rule of law and the property rights of an individual. So if Dyno can't have his own complaint then government may side with one neighbor against the other just like she did here. So the Village adopts a lie to facilitate my subjugation. You ought to ask her why she chose this course of action. Because of it, if I mortgage my home lease a lawyer I still can't have an injunction action for a zoning violation nor a nuisance action *cf* [BO 9, ¶1] another **FRCP 11** lie. If the Village theory is correct and I want any redress I can only show that the use is being used in some negligent manner **[Pttn 12, ¶5 - 13]** so until you say no to the Village she holds the use legal on Gibson's lie; as well as her belief that a lawyer, zoning board or Judge may impose that servitude upon anyone or me and not even say why.

The foregoing is arbitrary government. It is precisely what the 14th Amendment was designed to remedy.

Under strict construction of the ordinance, the use is a zoning violation **[Pttn 25, 5]** and if local NYS officials fail to enforce their ordinance then the individual injured in fact may bring an injunction against the violation themselves **[Pttn 15, ¶5]**.

But as I already stated **[Pttn 5-6]** quoting **Shelley v Kraemer** 334 US 1, 92 L. Ed 1161 US 17-22 and @ L. Ed. 1182-11885 ff. @19-20

> "These are not cases, as has been suggested, in which the State have merely abstained from action, leaving private individuals free to impose such [servitudes] as they see fit. Rather these are cases in which the State have made available to such individuals the full coercive power of government to deny [plaintiff] ... the enjoyment of property rights in the premises"

Former Village lawyer Gibson with inadmissible fabrications never served upon me duped motion term into dismissing a mandamus to review petition and more than a year later the Village decides that said dismissal was a declaration that the use in controversy is legal which led to the foregoing policy decision and actions addressed above. And now **[BO]** conceding that the Village sought to enjoin me, opposed my application for injunctive relief from sai[illegible] private use and ordered the Police to not intervene against it all based on the fraud of her former attorney **[BO, 8, ¶ 3]** claims:

> "[T]he Village chose not to intervene in Mr. Dyno's dispute with the Greens ..."

[BO 8, ¶3] :

> "The Village merely determined that the Green's use of their basketball hoop within a residential neighborhood was not a zoning violation"

The use in controversy is a basketball court adjacent to my home in the r6 zone, not use of a basketball hoop **[A80]**.

The properties are located in r(6) a single family residential zone with a minimum 6000 sq. ft lot size and said zone is comprised of 40' wide lots. Under strict construction of the ordinance a basketball court is not allowed on single family residential lots in r6 **[Pttn 9, ¶3; 10]**. Said use is situated 3' from the parallel side of my house on a 40' wide lot **[Pttn 4, ¶1]** the noise therefrom invading my property depriving me of my enjoyment of life and property raises a triable issue of intentional nuisance in fact for a Jury to decide, not motion term or the Mayor.

The Deep Issue

No person has the right to impose a private nuisance and thus no ordinance or Judge can make a private nuisance legal **[Pttn 12]** **Keystone Bituminous Coal *v.* DeBenedictus**, 480 U.S. 470, 491 n. 20 **[Pttn 23]** **Booth *v.* R., W., & O.T.R.R. Co** 140 NY 257, 35 NE 592 @ NY 274-275. The Village has no prerogative nor discretionary authority to "interpret" her ordinance it must be strictly construed **[Pttn 25]** **Cogswell *v.* NY, NH & H. R.R. Co.** 103 NY 10 @ 21. Even if there was room for interpretation, it cannot violate the US Const. **[Pttn id]** **Arkansas Natural Gas Co. *v* Arkansas Railroad Commission** 261 U.S. 379, 383 citing **Railway Co. *v* Arkansas** 235 U.S. 350

If an intentional nuisance in fact deprives an adjacent property holder of any right protected under the US Const, such as the right to be left alone as derived

from the law of nuisance, that a person be secure from unreasonable invasion in their enjoyment of life and property then if the Village by said course of actions subjects or caused me to be subjected to such invasion as the facts alleged show, then the municipality ought to be held liable under 42 USC § 1983.

If this dismissal of petition praying review of the zoning decision cannot bar a nuisance action then it cannot bar this Monell suit regarding official Village policy decisions and action subjecting me and causing me to be subjected to the same deprivation.

I don't see why the Village could not be held liable and neither does **[BO]** which explains the continued compounding of misrepresentation and deceit, **[Pttn 6, "(4)"; 11-12]** attempting to redefine what policy and policy actions are or what said use of land is.

Since the Village concedes that the use is an actionable nuisance, has failed to raise any issue of fact or point of law showing any governmental objective furthered by said subjugation and failing to show Village immunity from such prosecution then my action ought to be granted.

Objection in Point of Law

I) **Affirmative relief to Defendant/respondent is barred by her failure to appeal**

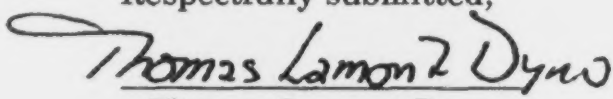
1st - The district court expressly ruled that my claims are not barred by Res Judicata or collateral estoppel. My constitutional challenge to said policy decisions and actions could not have been made before they happened. The Village failed to appeal from that judgment and is therefore barred from seeking relief

on those grounds. My objection on record, is preserved for appeal.

I declare under penalty of perjury that the foregoing is true and correct

Dated:
March 18, 2008

Respectfully submitted,



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Docket # 07 - 905

Supreme Court of the United States

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Petitioner

v.

The Village of Johnson City, New York

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

Petition for Rehearing

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Jurisdiction & Timeliness

This petition for rehearing, authorized by Rule 44.2 of this Court is filed within 25 days of the April 14, 2008 denial of My Petition for a Writ of Certiorari; and as certified in good faith is limited to other substantial grounds not previously presented.

The reason for rehearing is

(1) That illegal uses of land are proliferating under an official policy of the Village in violation of the Federal Constitution to my injury in fact and to those persons similarly situated; and that

(2) Said Village policy was facilitated by an arbitrary administrative procedure resulting from the irreparable injury rule; and

(3) That this Court overlooked and allows to stand an official Village policy which allows the municipality to subject and cause a private single family residential house holder to be subjected to an adjacent private intentional nuisance in fact, by an "interpretation" of her zoning ordinance, where strict construction is Constitutionally required.

Statement of Facts

1. My Monell complaint declaring 3 official Village Policy actions that subjected and caused me to be subjected to a private adjacent intentional nuisance in fact depriving me of property without due process of law in violation of Federal equal protection was dismissed under **FRCP 12(b)(6)**.

2. The NYS Court of Appeals ruled as settled law: that if a municipality fails to enforce her zoning

ordinance then a person injured in fact may petition for injunctive relief against a violation (hereinafter "right to petition"). **[I, I(A)** p. 4 *infra*]

3. In re equitable relief The NYS 3rd Department Appellate Division (hereinafter "the 3rd Dept.") imposes the irreparable injury rule, requiring proof of municipal refusal; and will not grant mandamus, to compel enforcement of local law;

4. To avoid dismissal under the irreparable injury rule the alternative is to file a complaint with the local code enforcement officer: with hir decision appealable to the zoning board of appeals and by statute, the board's decision, is subject to **NYS CPLR ¶78** mandamus to review.

Facts in re Deep Issue

6. Imposing a local administrative zoning procedure between my injury in fact and my right to petition is without authority resulted in a judgment without due process obtained by fraud on the court and deprived me of my right to petition under NYS law.

7. The 3rd Dept., practice of requiring me to file a zoning complaint before petitioning for injunctive relief provided a lawyer with the opportunity to improperly influence and mislead the local zoning board: 1st by means of a non-appealable informal letter which the board adopted in part as its decision and 2nd by submitting to the NYS Supreme Court, de hors matter never served upon me: comprised of a lawyer's misrepresentation of the actual zoning board decision supported by his interpretation of local law in lieu of the strict construction. **[I (A)(iv), (B)(iii)**; pp., 6-7, 8 respectively]

8. The result of the foregoing misrepresentation and deceit was a judgement in violation of settled rules relegating mandamus to review to the grounds invoked by the board, and in violation of the doctrine that a municipal zoning ordinance must be strictly construed. [**I (A)(i)** thru **(iv)**, pp. 5-7].

9. The foregoing judgment continues to serve as the basis of a general Village policy: declaring a lawyer's interpretation of a zoning ordinance, in lieu of the strict construction thereof, rendering an intentional nuisance in fact legal: while under strict construction of the ordinance, the use is a prima facie zoning violation, the legality of which was never fully or fairly determined under State or Federal law.

10. The foregoing 3rd Dept practice and judgment deprived me of a full and fair opportunity under settled NYS law to litigate an action for injunctive relief against a prima facie zoning violation. [**I, I (A)**]

The Federal Issue

11. The judgment dismissing the mandamus to review petition was not based on the grounds invoked by the board nor strict construction of the ordinance but instead was based on a lawyer's interpretation of the ordinance in violation of the settled rule for mandamus to review and the strict construction doctrine [pp. **5-7**];

12. The Federal Issue arose when the Village Mayor and Board of Trustees adopted said judgment and by official Village policy action(s) declared all such uses of land legal; and thereby created and defended a private property interest outside the bounds of the 14th A. to the U.S. Constitution [**I (B)** *ff.* **(iv)** pp. 8-9]

Argument

I) Imposition of an administrative zoning procedure as a precondition of my right to petition deprived me of Federal due process.

The Statutory Procedural Scheme of **NYS Village Law §7-714**, as construed in **Little Joseph Realty, Inc. *v* Town of Babylon** 41 NY 2d 738; 363 NE 2d 1163; 395 NYS 2d 428 @ NYS 2nd 431 headnote [1, 2] declares that if a municipality fails to enforce her ordinance a person injured in fact may petition for injunctive relief against the zoning violation

Lugar *v* Edmonson Oil Co. 457 U.S. 922, 937, 941:

> "[T]he deprivation must be caused by the exercise of some right or privilege created by the State ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor .... [T]he procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well".

I was deprived of my right to petition so that a lawyer's interpretation where strict construction is required might serve as pretence to declare a private nuisance and zoning violation legal.

(A) **28 USC 1652** requires the Federal Courts to accept "[t]hat the laws of the several states shall be regarded as rules of decisions in trials at the common law".

Under NYS Law:

(i) Jurisdictional Limits on Judges & Zoning Boards

Judges or Zoning boards or are not authorized to rezone **Little Joseph Realty, Inc. *v.* Town of Babylon** (op cit) 363 NE 2d 1163@ hdn [11]:

> "[W]hen it has been established that a defendant violates a valid zoning ordinance, there is no need for judicial accommodation of the defendant's use to that of the plaintiff. For a court to do so would be for it to usurp the legislative function . . . If the defendants can continue the unlawful use of property . . . the trial court's judgment would have worked to rezone the land ... notwithstanding the fact that the power to do so is reserved to the town board alone (National Land & Inv. Corp. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 521-522, 215 A. 2d 597)".

Matter of Scherbyn *v* Wayne Finger-Lakes Brd. of Co-op Ed. Services, *et al.* 77 NY 2d 753; 573 NE 2d 562:

> "It is a settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency . . . . If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis'

(ii) Constitutional Right of Trial by Jury

CPLR 4101.2 a private intentional nuisance in fact is a triable issue and summary Judgment cannot stand where a triable issue is present.

(iii) The Strict Construction Doctrine

Matter of 440 East 102nd Street Corp. *v* Murdock 285 NY 298 @ 304-305:

"Zoning laws which curtail and limit uses of property confer no privilege upon property owners. Even though in case of necessity such laws are properly within the exercise of the police power, the whole and each and every one of the parts must be given a strict construction since they are in derogation of common-law rights"

Cogswell *v* NY, NH & H. R.R. Co. 103 NY 10 @ 21

"Statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed.... The same principle is stated with unusual force of language by Chief Justice Marshall in *United States v Fisher* (2 Cranch, 390). He says: 'Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects"

(iv) Interpretation v Strict Construction

Matter of Hines *v* LaGuardia 293 NY 207, 216:

"[We do not find] ambiguity sufficient to raise a reasonable doubt as to the intention of the framers of those laws. In such circumstances, we may not . . . give weight to administrative practice [that] followed a course not approved by

either statute or rule. Administrative practice may not thwart a statute the purposes of which are as clear as those here involved [citing *inter alia*] *Neuberger* v. *Commiss.* 311 U.S. 83, 88-89".

People ex rel W.S. Electric Co. *v* CT & ES Co. 187 NY 58, 66-67:

"We are asked to adopt the interpretation of the act of 1887 which would sustain the position of the appellant on the ground that for several years the statute was practically construed in accordance with that view by various public officers of the city of New York . . . . There is no room for the application of the doctrine of practical construction in the case of a statute free from ambiguity or not subject to any reasonable doubt as to the meaning of its provisions....'Where no ambiguity or doubt appears in the law we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow extrinsic circumstances to introduce a difficulty where the language is plain' (Cooley's Const. Limitations [6th ed], p. 84".

(v) Limited Powers of Municipalities

NYC v NYS 86 N.Y.2d 286, 655 N.E.2d 649, 631 N.Y.S.2d 553 citing **Worcester *v* Worcester Consol. Street R. Co**. 196 US 539, 548-551.

Municipalities are mere agents of the State and thus her only powers are those granted to her by the Legislature; consequently she cannot have any powers which the State does not or cannot itself have; and no Judge can change that reality with hir absolute immunity or otherwise.

(B) **¶VI, cl. 2 of the U.S. Const.** in conjunction with 28 USC §1652 incorporates the foregoing State law as well as the following precedents for the vindication of my Federally protected rights:

(i) There is no right to impose a Private Nuisance

Keystone Bituminous Coal Assn *v* Benedictus 480 U.S. 470, 491 n. 20:

> "[N]o individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity".

(ii) Common Law Property rights Federally protected

Catlette *v* U.S. 132 F2d 902 @ 906 hdn 3 alludes to some rights protected under U.S. Const. 14th A. Citing **Meyer *v* Nebraska** (1923) 262 US 390, 399, 43 S. Ct. 625, 67 L. ed. 1042, 29 ALR 1446:

> "[The right] to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men".

(iii) If there is "Room for Interpretation"

Arkansas Natural Gas Co. *v* Arkansas Railroad Commission 261 U.S. 379, 383 citing **Railway Co. *v* Arkansas** 235 U.S. 350

> "The rule is fundamental that, if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter".

If no individual can legally impose a private nuisance **[I(B)(i) supra]** then a municipality or a court can't make such imposition legal **[I(A)(v)]**. Under NYS law, an alleged private nuisance cannot be ruled legal without Trial by Jury **[I(A)(ii)]** and thus dismissal of a mandamus to review petition cannot make a private intentional nuisance in fact legal under a municipal zoning ordinance governing single family residential districts. Under strict construction of the ordinance, the use is not allowed and all illegal uses of land are zoning violations. I have the right under NYS law to have a full and fair opportunity to prove the violation in an action for injunctive relief **[I(A)(i)]**. Interference with that right by the municipality and/or the Judiciary is a violation of Federally protected due process: any judgment obtained therefrom or action thereon is as equally devoid of due process.

(iv) **Shelley *v* Kraemer** 334 US 1, 22; 92 L. Ed 1161:

> "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf.* Marsh *v.* Alabama, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946)".

(II) Letting the Village policy stand allows the Village to subject and cause persons to be subject to such deprivation without due process of law and in violation of Federal equal protection.

If an adjacent use of land in a single family residential suburban zoning district deprives a person of the enjoyment of life and property then it is

triable as a nuisance **[I(A)(ii)]** and if it results from policy actions of the municipality or those said to represent it, then said actions are deprivations of property without due process of law..

(A) Property Rights Protected

(i) **In re Jacobs** 98 NY 98 @105:

> "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value annihilated; it is owned or kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property"

(ii) **Munn v. Illinois** 94 U.S. 113, 4 Otto 113, 24 L. Ed 77 @ U.S. 124-125, 142-143:

> "If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession; or if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is, for all practical purposes, deprived of the property, as effectually as if the legislature had ordered his forcible dispossession".

(iii) **Booth *v.* R., W., & O.T.R.R. Co** 140 NY 257, 35 NE 592 @ NY 274-275:

> "The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure"

(iv) **Yick Wo *v* Hopkins** 118 US 356 @373-374

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court [cites omitted]"

Solution

An order affirming my argument and declaring the Village policy on the unpublished judgment of NYS JSC Robert S. Rose, unconstitutional.

An unconstitutional Village Policy premised on the unpublished opinion of NYS JSC Rose: that Pig is for the sustenance of man, so that I ought not have, so delicate a nose **Aldred's Case** 9 Coke Rep. F. 57b Holmes would surely dissent. Accepting my sacrifice of the last 13 years: tens of thousands of dollars in court fees, printing, equal access to justice hours, time and treasure, lost, that may never be regained; rather than being misconstrued as cheering on the

roughshod I've received under Village policy hooves, you may declare that policy unconstitutional **Klostermann *v* Cuomo** 61 NY 2d 525; 475 NYS 2d 247; 463 NE 2d 588. Headnote [9] @NYS 2d 254:

> "The primary purpose of declaratory judgment is to adjudicate the parties' rights before a 'wrong' actually occurs ... (see Matter of Morgenthau v Erlbaum 59 NY 2d 143, 148; 464 NYS 2d 392, 451 NE 2d 150)"

In addition, remand for inquest on the quantum of damages and/or for a trial and for any other order or relief, which seems to this Court right and proper.

Pursuant to rule 44.2 of this Court: I the undersigned do hereby certify in good faith that this petition is restricted to other substantial grounds not previously presented and is not intended as any form of delay.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: May 6, 2008 Thomas Lamont Dyno

Thomas Lamont Dyno

State of New York
County of Broome